Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 05-____

IN THE
SUPREME COURT OF THE UNITED STATES

HENRY TORROMEO and MDR CORPORATION,
Petitioners,

v.

TOWN OF FREMONT, NEW HAMPSHIRE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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July 21, 2006

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APPENDIX A

United States Court of Appeals For the First Circuit

No. 04-2547

HENRY TORROMEO and MDR CORPORATION,
Plaintiffs, Appellants,

v.

TOWN OF FREMONT, NEW HAMPSHIRE,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Steven J. McAuliffe, U.S. District Judge]

Before
Selya, Lipez, and Howard, Circuit Judges.

Timothy S. Hollister with whom Patrick M. Fahey, Shipman & Goodwin, LLP, Sumner F. Kalman, Thea S. Valvanis, and Duane J. Desiderio were on brief, for appellants.

John J. Ryan with whom Casassa and Ryan, Eric Kane and Devine, Millimet & Branch, PA were on brief, for appellee.

February 21, 2006

HOWARD, Circuit Judge. This appeal arises from a dispute between Plaintiffs Henry Torromeo and MDR

Corporation and Defendant Town of Fremont, New Hampshire over the Town's delay in issuing certain building permits for property owned by Plaintiffs. Plaintiffs sued in federal court under 42 U.S.C. § 1983, claiming that the Town's delay constituted both a violation of the Takings Clause of the Fifth Amendment and a breach of the due process and equal protection guarantees of the Fourteenth Amendment.[1] The district court granted the Town's motion to dismiss under Fed. R. Civ. P. 12 (b) (6) because the complaint was barred by the Rooker-Feldman doctrine and res judicata. We affirm.

The case has a somewhat involved factual and procedural history. In the late 1990s, Plaintiffs received approval from the Fremont Planning Board for planned housing subdivisions. Subsequently, however, the Town enacted a growth control ordinance empowering the Board to limit the number of building permits that it would issue for new residential housing. The Board thereafter implemented such a limitation, which resulted in Plaintiffs being denied the needed permits.

Displeased, Plaintiffs sued in New Hampshire Superior Court, challenging the validity of the growth control ordinance and seeking an injunction compelling the Town to issue the building permits. The court granted the injunction because the Town had failed to satisfy a statutory prerequisite before adopting the ordinance. After the New Hampshire Supreme Court affirmed that ruling, the Town issued the permits.

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[1] The Takings Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. See Dolan v. Tigard, 512 U.S. 374, 383-84 (1994).

Plaintiffs then filed additional separate suits in the New Hampshire Superior Court, seeking compensation for the temporary taking of their property during the period in which they were wrongfully denied the permits. Their complaints referenced both the Takings Clause of the Fifth Amendment to the United States Constitution and the analogous provision of the New Hampshire Constitution, Part 1, Article 12. In addition, the complaints cited United States Supreme Court authority interpreting the federal Takings Clause. The cases were consolidated.

The superior court ruled that Plaintiffs were entitled to compensation to offset the losses from the wrongly-denied permits. After a trial on damages, the court awarded MDR $71,600 and Torromeo $23,800. The Town appealed to the New Hampshire Supreme Court which reversed. See Torromeo v. Fremont, 813 A.2d 389 (N.H. 2002). It reasoned that compensation is due for a temporary taking only where the losses are caused by a municipality's enactment of an unconstitutional ordinance. Id. at 392. Because the growth control ordinance had not been held unconstitutional, but merely invalid due to the Town's failure to follow statutory enactment procedures, no compensation was due. Id. Plaintiffs petitioned for a writ of certiorari in the United States Supreme Court, claiming that the New Hampshire Supreme Court's opinion conflicted with the Fifth Amendment's Takings Clause. The petition was denied. See 539 U.S. 923 (2003).

After the state-court judgment became final, Plaintiffs filed the present action. Their complaint claimed that the Town failure to compensate them justly for a taking violated the Fifth Amendment. They also alleged a violation of their substantive due process rights on the ground that the Town's denial of the building permits was

"arbitrary and capricious," and a violation of their equal protection rights because the Town treated them differently from "other similarly situated property owners."

The district court dismissed the complaint on two grounds. It first concluded that the complaint had to be dismissed under the Rooker-Feldman doctrine because the Plaintiffs' "federal lawsuit [was] little more than a thinly disguised effort to reverse the New Hampshire Supreme Court's decision rejecting their claimed entitlement, under the Fifth Amendment, to the damages for the temporary 'taking' of their real property." Torromeo v. Fremont, No. 03-481, 2004 WL 2300481, at *4 (D.N.H. 2004). The court alternatively held the complaint was res judicata because the Fifth Amendment claim was in fact adjudicated in the state-court proceeding, and the due process and equal protection claims could have been adjudicated in that proceeding. See id. at *6-7.

We review the district court's dismissal order de novo. See Roth v. United States, 952 F.2d 611, 613 (1st Cir. 1991). We will affirm only if the well-pleaded facts fail to establish the Town's liability under some actionable legal theory. See Rodi v. S. New England Sch. of Law, 389 F.3d 5, 13 (1st Cir. 2004).

After the district court dismissed Plaintiffs' complaint, the Supreme Court decided Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005), which substantially limited the reach of the Rooker-Feldman doctrine. See Federacion de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R., 410 F.3d 17, 23-24 (1st Cir. 2005) (describing the limitations placed on Rooker-Feldman by Exxon Mobil). Because we agree that Plaintiffs' Fifth Amendment claim is res judicata, we bypass the Rooker-Feldman issue and proceed to the

district court's alternative ruling.

Under federal law, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was entered." Migra v. Warren City Sch. Dist. Bd. of Ed., 465 U.S. 75, 81 (1984). This principle applies to a § 1983 action brought in federal court following a state-court judgment. Id. at 83-85. Thus, the effect of the New Hampshire court's final judgment on Plaintiffs' federal action is determined by applying New Hampshire's res judicata law.

In New Hampshire, "the essence of the doctrine of res judicata is that a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action." In re Juvenile, 888 A.2d 422, 425 (N.H. 2005). The doctrine precludes litigation in a later case of matters actually litigated, and matters that could have been litigated, in the earlier action. See Brzica v. Trustees of Dartmouth Coll., 791 A.2d 990, 999 (N.H. 2002). For res judicata to apply, three elements must be satisfied: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered in the first action. See id. "Cause of action" is broadly defined to mean "the right to recover, regardless of the theory of recovery." McNair v. McNair, 856 A.2d 5, 16 (N.H. 2004).

At first blush, this case appears to fall squarely within New Hampshire's res judicata rules. The parties to the federal action and the state actions were identical. The same cause of action was before the federal court as was before the state court because both suits sought compensation for harm caused by the Town's wrongful

denial of the permits. And the New Hampshire court entered final judgments on the merits of Plaintiffs' state-court actions.

There is, however, a complication. In 1985, the United States Supreme Court held that a takings claim under the Fifth Amendment is not ripe until the plaintiff has sought compensation through available state procedures. See Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-95 (1985); see also Deniz v. Guaynabo, 285 F.3d 142, 146 (1st Cir. 2002). In 1989, building on Williamson County, the New Hampshire Supreme Court held that federal-takings and related federal due-process claims raised in a state-court proceeding, alongside state-law claims for compensation, had to be dismissed without prejudice because they were not ripe until the state-law claims were resolved. See Blue Jay Realty Trust v. Franklin, 567 A.2d 188, 190-91 (N.H. 1989).[2]

Invoking Blue Jay Realty, Plaintiffs argue that res judicata does not bar their federal-court action because (1) their federal claims were not litigated in the state-court action and (2) they were not required to raise these claims in the state-court action because they were not ripe. See In re Iannochino, 242 F.3d 36, 43 n.4 (1st Cir. 2001) (res

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[2] Last term, the Supreme Court decided San Remo Hotel, L.P. v. San Francisco, -- U.S. --, 125 S.Ct. 2491 (2005), which calls Blue Jay Realty into substantial doubt. The San Remo Court held that Williamson County "does not preclude state courts from hearing simultaneously a plaintiff's request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Federal Constitution." Id. at 2506.

judicata does not apply where a claim could not have been raised in the first litigation); see also Restatement (Second) of Judgments § 26(1) (c) (1982) (res judicata does not bar a claim for relief in a subsequent action where the claim was not raised in the initial action "because of . . . restrictions on [the court's] authority to entertain multiple theories . . . in a single action").

But Plaintiffs' argument fails because the federal takings claim was actually litigated to a final judgment on the merits in the state court. As noted above, Plaintiffs' state-court complaints identified the Takings Clause of the Fifth Amendment to the United States Constitution as a basis for the cause of action. The complaints also cited First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987), a Supreme Court case interpreting the Takings Clause. In addition, after losing in the New Hampshire courts, Plaintiffs filed a writ of certiorari with the United States Supreme Court claiming that the New Hampshire decision violated their rights under the federal Takings Clause. These filings demonstrate that a federal takings claim was actually litigated in the state-court action. See C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 4406, at 143 (2d ed. 2002) (stating that formal pleadings and other filings are relevant to determining the claims that were advanced in a prior suit). Indeed, Plaintiffs admitted as much in their federal complaint, which states that the state-court proceedings were actions "to obtain just compensation for a taking under the U.S. and New Hampshire Constitutions."[3] The

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[3] Plaintiffs point to the fact that the New Hampshire Supreme Court cited only cases interpreting the New Hampshire Constitution as evidence that the litigation did not involve a

district court thus correctly concluded that res judicata barred Plaintiffs' Fifth Amendment claim.[4] See Peduto v. N. Wildwood, 878 F.2d 725, 728-29 (3d Cir. 1989) (affirming res judicata dismissal of a Takings Clause claim filed in federal court where the claim was litigated to a final judgment on the merits in a prior state-court proceeding).

We turn now to the Plaintiff's substantive due process and equal protection claims. Whether res judicata bars these claims presents a somewhat closer question. These additional federal-law theories were not litigated in

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federal takings claim. See Torromeo, 813 A.2d at 392. But the New Hampshire Supreme Court has stated that where a plaintiff raises state and federal takings claims in the same action, the court need not consider the claims independently because the Fifth Amendment's Takings Clause is no more protective than its state analogue. See Sanderson v. Candia, 787 A.2d 167, 169 (N.H. 2001). Therefore, the court's decision that the Town did not violate the takings provision of the state constitution means, a fortiori, that, in its view, there was no unlawful taking under federal law.

[4] Plaintiffs also assert that, even if the elements of res judicata are satisfied, we should permit the Fifth Amendment claim to proceed because New Hampshire law imbues courts with discretion to decline to apply res judicata. We have not found New Hampshire authority to this effect. The most that can be said is that New Hampshire applies res judicata on a "case-by-case basis." Cook v. Sullivan, 829 A.2d 1059, 1063 (N.H. 2003). But even assuming that New Hampshire law affords courts some discretion in applying res judicata, Plaintiffs have failed to explain why their case is exceptional. See Sondel v. Northwest Airlines, Inc., 56 F.3d 934, 941 (8th Cir. 1995) (doubting that res judicata was a discretionary doctrine under Minnesota law, but concluding that, even if discretion existed, res judicata barred a claim where the plaintiff failed to show that applying the doctrine worked an "injustice").

the state-court action, and there is a plausible argument that they are not res judicata because they could not have been litigated in that action under Blue Jay Realty. See Restatement of Judgments (Second), supra. On the other hand because, as just explained, Plaintiffs ignored the Blue Jay Realty rule by litigating their takings claim in the state-court action, one could argue that the due process and equal protection claims should have been raised along with the takings claim. In any event, we need not decide how New Hampshire's res judicata law would apply to this unique situation because the due process and equal protection claims fail as a matter of law. See Carroll v. Xerox Corp., 294 F.3d 231, 241 (1st Cir. 2002) (court of appeals may affirm the dismissal of complaint on any ground supported by the record).

We begin with the substantive due process claim. We recently explained the limits on substantive due process claims arising from land-use disputes:

> This Court has repeatedly held that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. The doctrine of substantive due process does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks

> the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interest. Although we have the left door slightly ajar for federal relief in truly horrendous situations, the threshold for establishing the requisite abuse of government power is a high one indeed.

SFW Arecibo Ltd. v. Rodriguez, 415 F.3d 135, 141 (1st Cir. 2005) (internal citations omitted).

In Arecibo, real estate developers sued after a state planning board incorrectly determined that their building permit had expired. Id. at 137. When suit was filed, the state court had already determined that the permit had been wrongly revoked. Id. at 138. We affirmed the dismissal of the substantive due process claim because the complaint stated "[i]n its strongest form . . . that the [p]lanning board made an erroneous decision in violation of state law," which is insufficient to establish a substantive due process violation. Id. at 141. So too here. Plaintiffs allege that the Town violated substantive due process by enacting the growth control ordinance without following the procedures mandated by New Hampshire law. But, as in Arecibo, the claim is only that the Town's violation of state law caused Plaintiffs harm. This is not enough. See id. at 141; see also Licari v. Ferruzzi, 22 F.3d 344, 349 (1st Cir. 1994) (affirming dismissal of substantive due process claim based on allegations that a town planning board improperly revoked the developer's building permits and delayed processing and approval of an application for an amended permit); PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28, 32 (1st Cir. 1991) (affirming dismissal of substantive due process claim where developer alleged that government agency failed to comply with agency regulations or practices in the review and approval process of construction

plans).

The equal protection claim fares no better. Plaintiffs contend that they stated a viable equal protection claim by pleading that, in denying the permits, the Town treated them differently from other "similarly situated property owners." But only in "extreme circumstances" will a land-use dispute give rise to an equal protection claim. Arecibo, 415 F.3d at 142. It is insufficient for a plaintiff merely to allege that the permitting entity violated state law in denying a permit request. Id. "Absent facts reflecting more fundamental discrimination, [a plaintiff] ha[s] not stated a claim under the Equal Protection Clause of the Fourteenth Amendment." Id. Yet, that is all that is alleged here.

Affirmed.

APPENDIX B

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 28, 2006

Mr. Timothy Salo Hollister
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103-1919

Re: Henry Torromeo, et al.
v. Town of Fremont, New Hampshire
Application No. 05A1227

Dear Mr. Hollister:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-mentioned case has been presented to Justice Souter, who on June 28, 2006 extended the time to and including July 21, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by
/s/
Jeffrey Atkins
Case Analyst

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. Timothy Salo Hollister
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103-1919

Clerk
United States Court of Appeals for the First Circuit
United States Courthouse
1 Courthouse Way
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APPENDIX C

United States Court of Appeals
For the First Circuit

No. 04-2547

HENRY TORROMEO; MDR CORPORATION
Plaintiffs – Appellants

v.

TOWN OF FREMONT, NEW HAMPSHIRE
Defendant – Appellee

Before

Boudin, Chief Judge,
Torruella and Selya, Circuit Judges,
Lynch, Lipez and Howard Circuit Judges,

ORDER OF COURT

Entered: April 11, 2006

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:
RICHARD CUSHING DONOVAN, Clerk
By: /s/ Julie Gregg
Operations Manager

[cc: Duane Desiderio, Esq., Sumner Kalman, Esq., Thea Vlvanis, Esq., Timothy Hollister, Esq., John Ryan, Esq., Eric Kane, Esq., Donald Gardner, Esq. Michael Berger, Esq.]

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Henry Torromeo and
MDR Corporation,
Plaintiffs

v.

Civil No. 03-481-SM
Opinion No. 2004 DNH 148

Town of Fremont,
Defendant

ORDER

Plaintiffs, Henry Torromeo and MDR Corporation, bring this action against the Town of Fremont, seeking damages for what they say was the Town's unlawful and unconstitutional delay in issuing various building permits. See generally 42 U.S.C. § 1983. According to plaintiffs, by unlawfully delaying the issuance of building permits requested by them, the Town temporarily effected a taking of their property for public use, without paying them just compensation. Additionally, plaintiffs claim the Town deprived them of Due Process and Equal Protection, in violation of the United States Constitution.

The Town moves to dismiss plaintiffs' three-count complaint, saying their claims are barred by the Rooker-

Feldman doctrine and res judicata. Plaintiffs object.

Standard of Review

When ruling on a motion to dismiss, the court must "accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences therefrom in the plaintiff's favor and determine whether the complaint, so read, sets forth facts sufficient to justify recovery on any cognizable theory." Martin v. Applied Cellular Tech., Inc., 284 F.3d 1, 6 (1st Cir. 2002). Dismissal is appropriate only if "it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." Langadinos v. American Airlines, Inc., 199 F.3d 68, 69 (1st Cir. 2000). See also Gorski v. N.H. Dep't of Corr., 290 F.3d 466, 472 (1st Cir. 2002). Notwithstanding this deferential standard of *review,* however, the court need not accept as true a plaintiff's "bald assertions" or conclusions of law. See Resolution Trust Corp. v. Driscoll, 985 F.2d 44, 48 (1st Cir. 1993) ("Factual allegations in a complaint are assumed to be true when a court is passing upon a motion to dismiss, but this tolerance does not extend to legal conclusions or to `bald assertions.'") (citations omitted). See also Chongris v. Board of Appeals, 811 F.2d 36, 37 (1st Cir. 1987).

Here, in support of its motion to dismiss, the Town relies upon various state and federal court filings made by plaintiffs in prior litigation, opinions issued by New Hampshire state courts, and the United States Supreme Court's denial of plaintiffs' petition for writ of certiorari. Typically, a court must decide a motion to dismiss exclusively upon the allegations set forth in the complaint (and any documents attached to that complaint) or convert the motion into one for summary judgment. See Fed. R. Civ. P. 12(b). There is, however, an exception to that general rule:

> [C]ourts have made narrow exceptions for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint.

Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993) (citations omitted). See also Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 17 (1st Cir. 1998). Since plaintiffs do not dispute the authenticity of the documents upon which the Town relies, the court may properly consider those documents without converting the Town's motion to dismiss into one for summary judgment.

Background

Torromeo owns approximately 100 acres in the Town of Fremont, and MDR owns approximately 50 acres. Both parcels are zoned to permit residential construction. In February of 1997, the Town approved Torromeo's subdivision plan for "Mason's Corner," and that plan was recorded with the county registry of deeds. Approximately two and one-half years later, the Town approved MDR's subdivision plan for "Glidden Hill Estates," and that plan, too, was recorded in the county's land records.

In March of 1999, the Town adopted a growth control ordinance (the "Ordinance") which authorized the Fremont Planning Board to limit the number of building permits issued annually for the construction of residential units within the Town. Pursuant to that ordinance, the Town implemented "Growth Control and Permit Limitations," which limited to 16 the number of building permits that would be issued to property owners during the one-year period between April 14, 1999, and April 13, 2000. Within that time frame, MDR applied for six permits to construct single-family units at Glidden Hill Estates. The

Town issued only five and informed MDR that it must wait until April of 2000 before additional building permits would issue for that development. Later, Torromeo sought building permits for the five remaining lots at Mason's Corner. That request was, however, denied since the Town had already issued the maximum number of building permits for that year under the Ordinance.

In August of 1999, MDR brought a petition for declaratory judgment in Rockingham County Superior Court, alleging that the Town's Ordinance was not enacted in compliance with state law and was, therefore, unenforceable. The state court agreed, and ruled that the Ordinance was invalid dating back to its adoption. The New Hampshire Supreme Court summarily affirmed the trial court's decision. Accordingly, the Town stopped enforcing the Ordinance against MDR and issued the requested building permits.[1]

Torromeo also filed a petition for declaratory judgment in Rockingham Superior Court, claiming that because the Town approved his subdivision plan prior to adopting the Ordinance, it was exempt from the provisions of the Ordinance. Again, the court agreed and ordered the Town to issue the requested building permits. The Town

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[1] Under New Hampshire law, municipalities are authorized to "regulate and control" the timing of local development by, for example, enacting growth control ordinances such as the one adopted by Fremont. N.H. Rev. Stat. Ann. 674:22. Importantly, however, "[a]ny ordinance imposing such a control may be adopted only after preparation and adoption by the planning board of a master plan and a capital improvement program." Id. Fremont's ordinance was declared void ab initio because the state court concluded that the Town failed to adopt a valid capital improvement program.

complied.

In March of 2000, plaintiffs joined forces and filed an action in the Rockingham County Superior Court seeking damages from the Town for inverse condemnation. Pointing to the fact that the state court previously ruled the Town's Ordinance invalid, plaintiffs claimed entitlement to damages for the temporary "taking" of their property (i.e., the delayed issuance of the building permits). In support of their view, plaintiffs invoked provisions of both the state and federal constitutions. See Complaint at para. 21 ("On March 21, 2000, Plaintiffs each filed actions in the Rockingham County Superior Court to obtain just compensation for a taking under the U.S. and New Hampshire Constitutions." (emphasis supplied).

The state trial court agreed with plaintiffs, and concluded that they were entitled to compensation for the economic loss they suffered as a result of the Town's delay in issuing the building permits. Accordingly, the court ordered the Town to pay Torromeo damages in the amount of $23,800, and MDR damages in the amount of $71,600.

The Town appealed those decisions to the New Hampshire Supreme Court. In their joint brief, plaintiffs cited both the state and federal constitutions in support of their view that the lower state court had properly found that they were entitled to compensation for the temporary "taking" of their property. See, e.g., Exhibit D to defendant's motion to dismiss, plaintiffs' brief to the New Hampshire Supreme Court, at 8 ("The Town, by imposing the invalid Growth Ordinance, caused a `taking' of plaintiffs' property violating their protected right to use and enjoy their property as a fundamental right protected by both our State and Federal Constitutions. . . The Constitution prohibits takings without compensation."). See

also id. at 11 ("The right to use and enjoy one's property is a fundamental right protected by both our State and Federal Constitution. The Fifth Amendment of the United [States] Constitution provides, `nor shall private property be taken for public use without just compensation.'").

The New Hampshire Supreme Court concluded that plaintiffs were not entitled to compensation and, therefore, reversed the trial court's damages award. Torromeo v. Town of Fremont, 148 N.H. 640 (2002). Specifically, the court held that while the Town's Ordinance had previously been declared invalid, plaintiffs had not demonstrated that it was unconstitutional. The court went on to discuss the distinction between a local ordinance that is unconstitutional and one that is merely unenforceable due to a procedural defect in its enactment. It then noted that, absent proof from plaintiffs that the Ordinance was unconstitutional, rather than merely procedurally flawed, "this case presents merely the type of municipal error for which judicial reversal of the erroneous action is the only remedy." Id. at 644. Accordingly, the court held that "plaintiffs are not entitled to damages, and . . . their only remedy is issuance of the erroneously-denied building permits." Id.

Plaintiffs sought review by the United States Supreme Court. Again, they relied upon the federal constitution in support of their view that they were entitled to compensation from the Town for the temporary taking of their property. See, e.g., Exhibit F to defendant's motion, plaintiffs' petition for writ of certiorari at 2 ("Certiorari should be granted to clarify that a municipality can violate the Takings Clause when it enforces an illegal land-use law, which a court declares was invalid from the start, and refuses to provide the constitutional remedy of `just compensation' promised by the Fifth Amendment."). The

Supreme Court denied plaintiffs' petition for certiorari. Torromeo v. Town of Fremont, 539 U.S. 923 (2003).

Having been denied relief by New Hampshire Supreme Court (and the United States Supreme Court), plaintiffs filed this federal suit against the Town. In their three-count complaint, plaintiffs allege: (1) the "application of the Town's Growth Control Ordinance . . . deprived [them] of the economic use of their respective properties, in violation of the Fifth and Fourteenth Amendments." Complaint at para. 32; (2) the Town's denial of building permits, "to which plaintiffs were entitled, constitutes a denial of due process." Complaint at para. 37; and (3) they were "treated disparately because they were not permitted to receive building permits solely by virtue of the Town's unreasonable application of the illegal Ordinance to their respective projects." Complaint at para. 41. As noted above, the Town moves to dismiss plaintiffs' claims, invoking the Rooker-Feldman doctrine and principles of res judicata.

Discussion

I. The Rooker-Feldman Doctrine.

The Rooker-Feldman doctrine precludes a federal district court from reviewing a final judgment entered in a state court, and from considering claims that are inextricably intertwined with those raised in the state court proceeding. See Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983). See also Wang v. New Hampshire Bd. of Registration in Medicine, 55 F.3d 698, 703 (1st Cir. 1995). Federal claims are inextricably intertwined with state court proceedings (even if precisely the same claims were not raised previously in state litigation) if the party had an opportunity to raise those claims in the state court and if their resolution in federal

court would effectively provide a form of federal appellate review of the state court's decision. See Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring).

Moreover, once a state court issues a final judgment, a federal district court lacks jurisdiction to review that decision even if the state judgment as patently wrong or was entered following patently unconstitutional proceedings. See Feldman, 460 U.S. at 486. Thus, a litigant may not seek to reverse a final state court judgment "simply by casting his complaint in the form of a civil rights action." Ritter v. Ross, 992 F.2d 750, 754 (7th Car. [sic] 1993) (citation omitted).

Here, plaintiffs' federal suit as little more than a thinly disguised effort to reverse the New Hampshire Supreme Court's decision rejecting their claimed entitlement, under the Fifth Amendment, to damages for the temporary "taking" of their real property. Consequently, that constitutional claim is "foreclosed by a textbook application of the Rooker-Feldman doctrine."
Picard v. Members of the Employee Ret. Board, 275 F.3d 139, 145 (1st Cir. 2001).

The same is true with regard to plaintiffs' Fourteenth Amendment claims (counts two and three), which are "inextricably intertwined" with their Fifth Amendment claim. As the court of appeals for this circuit has observed:

> Where a party did not actually present its federal claims in state court, Rooker-Feldman forecloses lower federal court jurisdiction over claims that are "inextricably intertwined" with the claims adjudicated in a state court. A federal claim is inextricably intertwined with the state-court claims if the

> federal claim succeeds only to the extent that the state court wrongly decided the issues before it.

Sheehan v. Marr, 207 F.3d 35, 39-40 (1st Cir. 2000) (citations and internal punctuation omitted). In this case, to rule in plaintiffs' favor on their Fourteenth Amendment claims would, in essence, require this court to reverse the New Hampshire Supreme Court's holding that plaintiffs failed to demonstrate that the Ordinance was unconstitutional, that they "are not entitled to damages, and that their only remedy is issuance of the erroneously-denied building permits." Torromeo v. Town of Fremont, 148 N.H. at 644. The Rooker-Feldman doctrine plainly provides that this court lacks jurisdiction to issue such a ruling. See, e.g., Hill v. Town of Conway, 193 F.3d 33, 40 (1st Cir. 1999) ("Appellants in the face of a Superior Court determination that they `are not entitled to damages,' have sought in their § 1983 suit a `Judgment . . . awarding an amount of damages that will fairly compensate . . . for the taking of their real property.' In short, . . . the relief for which the plaintiffs prayed would, if granted, effectively void the state court's judgment. As the district court properly determined, Rooker-Feldman precludes such an adjudication.") (citation and internal quotation marks omitted).

In support of their view that the Rooker-Feldman doctrine does not preclude relitigation of their federal constitutional claims in this forum, plaintiffs rely on Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118 (2d Cir. 2003). That reliance is, however, misplaced. First, unlike the plaintiff in Santini, these plaintiffs were not precluded from litigating their federal constitutional claims in state court. See id. at 129 ("Santini did not, and could not, present his federal claim to the state court. . . . the Connecticut state courts would not have adjudicated

Santini's federal takings claim [even] if he had presented it to them."). In fact, as they unequivocally assert in their complaint, plaintiffs in this case actually advanced their federal constitutional claims in state court. See Complaint at para. 21.

Moreover, in Santini, the court of appeals held that a plaintiff who must, pursuant to Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), litigate his or her takings claims in state court, may specifically notify the court that he or she is reserving any federal constitutional claims for resolution by the federal district court.

> While we have not previously held that parties may use the England [v. Louisiana State Bd. of Med. Examiners, 375 U.S. 411 (1964)] reservation procedure in cases that did not properly originate in federal court, we deem it appropriate to permit parties like Santini, who litigate state-law takings claims in state court involuntarily, to reserve their federal takings claims for determination by a federal court.
>
> * * *
>
> [P]arties may explicitly reserve their federal takings claims, making clear to the state court and adverse parties that they intend to bring a federal takings claim in federal court once the litigation of the state-law claim has been completed.

Santini, 342 F.3d at 130 (emphasis supplied). Here, however, plaintiffs never gave any indication to the state courts (or opposing counsel) that they were expressly

"reserving" their federal constitutional claims for resolution in the federal forum. In fact, as noted above, plaintiffs actually litigated those claims.[2]

II. Res Judicata.

Even if the plaintiffs' constitutional claims were not precluded by virtue of the Rooker-Feldman doctrine, they would be barred by the doctrine of res judicata.

The federal full faith and credit statute, 28 U.S.C. § 1738, commands federal courts to employ state rules of res judicata when determining the preclusive effect, if any, to be given to a prior state court determination. See Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985); Kremer v. Chemical Constr. Corp., 456

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[2] It is, perhaps, worth noting that the Court of Appeals for the First Circuit has expressly rejected the use of an England reservation of federal claims in a condemnation/takings-case quite similar to this one.

> [Plaintiff] argues that the federal constitutional issues were not raised in the state proceedings, but rather were reserved under England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). The rule laid down in England is not applicable to this case. Section 1983 does not override state preclusion law by allowing plaintiffs to first proceed to judgment in state courts and then turn to federal courts for adjudication of federal claims. Thus plaintiff's argument re[garding] England is meritless.

Griffin v. Rhode Island, 760 F.2d 359, 360 n.1 (1st Cir. 1985) (parallel citations omitted). That case was, however, decided before the Supreme Court issued its opinion in Williamson.

373, 380 (1985); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 468 (1982). Accordingly, if the Rooker-Feldman doctrine did not preclude this court from hearing plaintiffs' constitutional claims, the principles of res judicata, as developed by the New Hampshire Supreme Court, would apply.

Under New Hampshire law, "[t]he doctrine of res judicata precludes the litigation in a later case of matters actually litigated, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action." In re Alfred P., 126 N.H. 628, 629 (1985) (citations omitted). "In order for res judicata to apply to a finding or ruling, there must be `a final judgment by a court of competent jurisdiction [that] is conclusive upon the parties in a subsequent litigation involving the same cause of action.'" In re Donovan, 137 N.H. 78, 81 (1993) (quoting Marston v. U.S. Fidelity & Guar. Co., 135 N.H. 706, 710 (1992)).

In other words, for the doctrine of res judicata to apply, "three elements must be met: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered on the first action." Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 454 (2002). The term "cause of action" means the "right to recover, regardless of the theory of recovery." Eastern Marine Constr. Corp. v. First S. Leasing, 129 N.H. 270, 274 (1987) (citations omitted).

Here, each of those three essential elements is present. As to the existence of the first and third elements, there can be little doubt that the parties in the two proceedings are identical and the state supreme court resolved plaintiffs' claims against them on the merits.

Finally, the "causes of action" advanced (and the underlying facts upon which those claims are based) in the two proceedings are also identical. In both this proceeding and the earlier state court proceeding, plaintiffs asserted that the Town's delay in issuing the requested building permits under an invalid local ordinance amounted to an unconstitutional taking of their property and, therefore, entitled them to compensation. While plaintiffs may not have articulated their claimed entitlement to damages in precisely the same way in this and the earlier state court litigation, the "causes of action" are identical: claims for compensation stemming from the allegedly unconstitutional (albeit temporary) withholding of the requested building permits.

Finally, even if one could reasonably conclude that the causes of action advanced in the state court litigation are not identical to the Fourteenth Amendment claims advanced in this proceeding, it is beyond doubt that plaintiffs could have advanced their Fourteenth Amendment claims in the state court proceeding (and, as noted above, it is equally clear that they did not reserve those claims under England). Consequently, those claims are barred by the doctrine of res judicata, which precludes relitigation of all matters actually litigated and any matters that could have been litigated in the same proceeding. See Appeal of Univ. System of N.H. Bd. of Trustees, 147 N.H. 626, 629 (2002) ("Res judicata, or claim preclusion, bars the relitigation of any issue that was or might have been raised in respect to the subject matter of the prior litigation. In determining whether two actions are the same cause of action for the purpose of applying res judicata, we consider whether the alleged causes of action arise out of the same transaction or occurrence.") (citations and internal quotation marks omitted); Brzica, 147 N.H. at 455-56 ("Res

judicata will bar a second action even though the plaintiff is prepared in the second action to present evidence or grounds or theories of the case not presented in the first action."); Radkay v. Confalone, 133 N.H. 294, 298 (1990) ("Generally, once a party has exercised the right to recover based upon a particular factual transaction, that party is barred from seeking further recovery, even though the type of remedy or theory of relief may be different.").

Conclusion

For the foregoing reasons, as well as those set forth in defendant's memorandum and its reply memorandum, defendant's motion to dismiss (document no. 11) is granted. The Clerk of Court shall enter judgment in accordance with this order and close the case.

SO ORDERED.

/s/_____
Steven J. McAuliffe
United States District Judge

October 12, 2004

cc: Duane J. Desiderio, Esq.
Sumner F. Kalman, Esq.
Michael A. Ricker, Esq.
John J. Ryan, Esq.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Henry Torromeo and MDR Corporation Plaintiff(s) v. Town of Fremont Defendant(s)	*	Civil No. 03-481-SM

COMPLAINT FOR DEPRIVATION OF
CIVIL RIGHTS UNDER 42 U.S.C. § 1983

I. NATURE OF THE ACTION

1. This is an action to recover damages under 42 U.S.C. § 1983 The Town of Fremont, New Hampshire, through its "Town Meeting" (the local legislative body) and Planning Board (collectively, "the Town"), has acted under color of state law and has made decisions resulting in the illegal restriction of the use and development of Plaintiffs'

respective parcels of land within the Town's jurisdiction. As a result of the Town's actions, it has taken Plaintiffs' property for public use without paying them just compensation (in violation of the Fifth and Fourteenth Amendments of the United States Constitution), and deprived Plaintiffs' Due Process and Equal Protection (in violation of the Fourteenth Amendment of the United States Constitution).

II. PARTIES

2. Plaintiff Henry Torromeo is a New Hampshire resident and the owner of five (5) lots of a 27-lot subdivision known as "Mason's Corner." Torromeo previously owned and built homes on the subdivision's remaining 22 lots. The total acreage of the affected site for Mason's Corner comprises 97.4 acres.

3. Plaintiff MDR Corporation is a small, family-owned business incorporated in the State of New Hampshire, which is also its principal place of business. MDR owns a 14-lot subdivision known as "Glidden Hill Estates." The total acreage of the affected site for Glidden Hill Estates comprises 51 acres.

4. Defendant Town of Fremont (the "Town") is a municipal corporation of the State of New Hampshire. Within its borders, the Town, through its Town Meeting and Planning Board, is authorized to implement and administer the Town's planning and zoning laws, and to review and approve development plans for the subdivision of residential property. Moreover, the Town is permitted by statute to regulate the growth of development through the use of growth control ordinances, provided that such ordinances are supported by validly enacted Capital Improvement Programs ("CIP"). The Town applied a growth control ordinance, which is the subject of this Complaint, to Petitioners' respective development projects.

III. JURISDICTION AND VENUE

5. This action arises under 42 U.S.C. § 1983, and the Fifth and Fourteenth Amendments to the United States Constitution. Accordingly, this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and § 1343 (original jurisdiction for Section 1983 actions). Plaintiffs have pursued, exhausted, and been denied, all available avenues for compensation provided by state law.

6. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b).

IV. FACTUAL ALLEGATIONS

A. The Properties at Issue and Their Zoning Classifications

7. Plaintiff Torromeo's 97.4 acre property and Plaintiff MDR Corporation's 51 acre property are each zoned to allow residential development.

8. Plaintiff Torromeo's property for the Mason's Corner project was approved for subdivision by the Fremont Planning Board on February 5, 1997. The plan for Mason's Corner was recorded with the county and was eligible for building permits as of February 6, 1997.

9. Plaintiff MDR's property for the Glidden Hill Estates project was approved for subdivision by the Fremont Planning Board on August 18, 1999. The plan for Glidden Hill Estates was recorded with the county and was eligible for building permits as of August 19, 1999.

10. The Fremont Planning Board fully reviewed and approved both the Mason's Corner and Glidden Hill Estates projects to accommodate single-family homes.

B. Fremont's Imposition of Growth Control Ordinance on Plaintiffs' Properties

11. In March of 1999, the Town of Fremont adopted a Growth Control Ordinance (the "Ordinance"), which gave the Fremont Planning Board authority to limit the number of building permits allocated for the construction of residential units in Fremont.

12. Acting on this authority, the Fremont Planning Board, on April 14, 1999, implemented "Growth Control and Permit Limitations," which restricted the number of building permits that would be issued to property owners during the year April 14, 1999, through April 13, 2000. Consequently, the Town of Fremont issued a maximum of 26 building permits for residential construction during the period April 14, 1999, through April 13, 2000. Once a permit was issued under the "Growth Control and Permit Limitations," builders had 30 days to commence construction or the permit would otherwise lapse.

13. Subsequent to the Ordinance's effective date, Plaintiff MDR applied for six (6) building permits to construct single-family homes at its site, Glidden Hill Estates. The Town applied the Ordinance to the Glidden Hill project, thereby issuing only five (5) permits and informing MDR that it would have to wait at least a year, until April, 2000, until additional permits for Glidden Hill could issue. After the Town only issued the five (5) permits for lots at Glidden Hill Estates, MDR nonetheless applied for permits on the remaining nine (9) lots to fully build-out the 14-lot subdivision. The Town denied these permits in reliance on the Ordinance.

14. Plaintiff Torromeo's project, Mason's Corner, was recorded and eligible for building permits more than two years before the Town adopted the Ordinance. The recordation of Mason's Corner prior to the Ordinance qualified the project as a vested subdivision under state law, and was therefore exempt from all

subsequent zoning changes for a period of four years. See New Hampshire Revised Statutes Annotated (RSA) 674:39.

15. In September 1999, Plaintiff Torromeo applied for building permits on the five (5) remaining lots for Mason's Corner. Although those lots were vested under New Hampshire law, the Town nonetheless applied the Ordinance to Torromeo's application and refused to issue the requested building permits because the Town had already issued the maximum number of permits allowed under the Ordinance for that year.

16. In addition to complying with all subdivision requirements, Plaintiffs Torromeo and MDR Corporation had built and paved necessary roadways, in compliance with prior Town and state approvals. Costs associated with the road building for Mason's Corner totaled approximately $225,000 for Torromeo. For Glidden Hill Estates, road building costs for MDR Corporation totaled approximately $775,000.

C. **Growth Control Ordinance Declared Invalid *Ab Initio* by New Hampshire Courts**

17. After having had their respective building permit applications denied, Plaintiffs each filed lawsuits against the Town for injunctive relief to compel permit issuance. The New Hampshire Superior Court granted the requested injunction in a decision dated December 27, 1999. Exhibit 1. The court ruled that the permits should have been issued because the Ordinance was invalid, *ab initio*, for failure to meet requirements established by the New Hampshire legislature. After an appeal by the Town, the New Hampshire Supreme Court, on June 26, 2000, summarily affirmed the Superior Court's decision that the Ordinance was invalid, *ab initio*. Exhibit 2.

18. The New Hampshire courts found the Ordinance illegal after determining that the Town never

enacted a valid Capital Improvements Plan ("CIP") in support of the Ordinance, a statutory prerequisite in New Hampshire for any growth control ordinance enacted by a municipality. See RSA 674:22. Additionally, the Town was required by statute to publish a "warrant article," or notice, informing the general public that the Planning Board would be preparing a CIP. See RSA 39:2. The Town never published such a warrant providing notice of the preparation of a CIP.

19. Without a valid CIP, the New Hampshire courts ruled that the Ordinance, the basis for which the Town denied Plaintiffs' their respective building permits, was "invalid, *ab initio*" and never should have been enforced.

20. Accordingly, the Town issued the nine remaining building permits to Plaintiff MDR for the Glidden Hill Estates project on June 26, 2000. The Town issued five building permits for Plaintiff Torromeo's vested lots for the Mason's Corner project in February, 2000.

D. **Plaintiffs File Takings Lawsuits in State Court for Just Compensation**

21. On March 21, 2000, Plaintiffs each filed actions in the Rockingham County Superior Court to obtain just compensation for a taking under the U.S. and New Hampshire Constitutions. Although Plaintiffs were ultimately issued building permits, their takings claims were filed to obtain just compensation for the period during which the Town applied the illegal Ordinance to their respective properties.

22. At the commencement of the takings phase of the lawsuits, Plaintiffs MDR and Torromeo filed motions for summary judgment on the issue of liability. The New Hampshire Superior Court initially denied the motions on October 3, 2000. Exhibit 3. The Superior Court adopted

the Town's position that the Ordinance was "merely" defective procedurally for failure to adopt a CIP, and that unless the law itself was determined to be "unconstitutional," a taking would not arise.

23. Plaintiffs then filed a "Request for Ruling of Law," a procedure allowed under New Hampshire Superior Court Rule 141, allowing parties to request "interlocutory...order relative to proceedings preparatory for a hearing on the merits." In their Request for Ruling, the Plaintiffs asserted that the Town's refusal to issue building permits in reliance on the invalid, *ab initio* Ordinance was in and of itself an unconstitutional taking. On January 17, 2001, the Superior Court reversed itself, ruling that an award of damages *was* appropriate and that Plaintiffs need not prove that the Ordinance was "unconstitutional" to recover monetary relief. Exhibit 4.

24. The Town of Fremont then filed a motion for reconsideration in which it argued that the Superior Court's January 17, 2001, order was inconsistent with its previous ruling that denied liability on summary judgment. In an order dated March 19, 2001, the Superior Court formally joined the Torromeo and MDR takings actions and ruled that Plaintiffs were "entitled as a matter of law to recover damages for economic loss due to the Town's attempted enforcement of its invalid Growth Control Ordinance." Exhibit 5, p. 1. The Superior Court further held that "economic losses were compensable whether or not a 'taking' ha[d] occurred under existing case law." *Id.* pp. 3-4.

25. A trial on damages came next. On September 26, 2001, the Superior Court ruled that Plaintiff Torromeo was entitled to $23,800, which equaled the carrying costs and fair market value of his five unbuildable vested lots from August 26, 1999, through February 2000. Exhibit 6, p. 9. August 26, 1999 was the date that building

permits were no longer available under the invalid Ordinance. February 2000 was the date that building permits were again issued for Mason's Corner.

26. In the same September 26, 2001, opinion, the Superior Court also ordered compensation for Plaintiff MDR in the amount of $71,600, for the nine lots at MDR's Glidden Hill Estates subdivision. Exhibit 6, p. 9. These damages were calculated from the period August 26, 1999 through June 2000, the dates that building permits were blocked, then released, to MDR.

27. The Town appealed the Superior Court's decision. On December 13, 2002, the New Hampshire Supreme Court reversed, ruling that the Town was not liable to either of the Plaintiffs for damages. The New Hampshire Supreme Court's decision is reported at 813 A.2d 389 (N.H. 2002). The New Hampshire Supreme Court found as erroneous the Superior Court's failure to distinguish between an ordinance that is unconstitutional and one that is merely unenforceable due to a procedural defect in its enactment. Moreover, the New Hampshire Supreme Court ruled that just compensation is due only when a court "determin[es] that the ordinance is unconstitutional and constitutes a taking..." and that just compensation is *not* due for "an erroneous planning board decision based upon an otherwise valid regulation." 813 A.2d at 392. Finally, the Supreme Court held that judicial reversal of the erroneous action was the only available remedy. *Id.* at 392.

CLAIMS FOR RELIEF

Count 1: Taking in Violation of the Fifth and Fourteenth Amendments

28. Plaintiffs incorporate by reference each and every allegation set forth in ¶¶ 1 through 27 above.

29. The Fifth Amendment of the United States Constitution prohibits the government from taking private property for public use without the payment of just compensation. Through the Fourteenth Amendment, the requirements of the Fifth Amendment, including the Takings and Just Compensation Clauses, apply to the State of New Hampshire.

30. 42. U.S.C. § 1983 states that any person acting under color of state law who deprives any other person of rights secured by the United States Constitution shall be liable to the party seeking redress.

31. The application of the Town of Fremont's Growth Control Ordinance, which was *never* legal, to Plaintiffs' properties, failed to substantially advance any legitimate governmental interest, in violation of the Fifth and Fourteenth Amendments.

32. The application of the Town's Growth Control Ordinance, which was *never* legal, deprived Plaintiffs of the economic use of their respective properties, in violation of the Fifth and Fourteenth Amendments.

33. Accordingly, the Town must pay just compensation to the Plaintiffs for the respective takings of their properties.

Count 2: Deprivation of Due Process

34. Plaintiffs incorporate by reference each and every allegation set forth in ¶¶ 1 through 33 above.

35. The Fourteenth Amendment of the United States Constitution provides that no State shall deprive any person of their property without due process of law. The guarantee of due process demands that property owners have the right to be free from arbitrary, capricious, and unreasonable land use decisions of government regulators.

36. As a matter of law, Plaintiff Torromeo had a cognizable property interest subject to due process

protections because his recorded lots for the Mason's Corner subdivision were vested under New Hampshire statute, RSA 674:39. With regard to Plaintiff MDR Corporation, the only reason the remaining lots at Glidden Hill Estates were not vested was because the illegal Growth Control Ordinance was enacted after the lots' recordation.

37. The Town never should have applied the "invalid, *ab initio*" Ordinance to preclude issuance of the building permits to Plaintiffs' respective parcels. The denial of permits, to which Plaintiffs were entitled, constitutes a denial of due process. Application of the Ordinance, which was invalid from its inception and was not rationally related to a legitimate governmental interest, was an arbitrary and capricious action of the Town that denied Plaintiffs' due process.

Count 3: Denial of Equal Protection

38. Plaintiffs incorporate by reference each and every allegation set forth in ¶¶ 1 through 37 above.

39. The Fourteenth Amendment of the United States Constitution provides that no State shall deny any person within its jurisdiction the equal protection of the laws.

40. Plaintiff MDR Corporation received different treatment from other similarly situated property owners. It was treated disparately because it was unable to vest its lots for Glidden Hill Estates only because they were recorded after the Town enacted the illegal Ordinance.

41. Both Plaintiffs Torromeo and MDR Corporation received different treatment compared to other similarly situated property owners. They were treated disparately because they were not permitted to receive building permits solely by virtue of the Town's unreasonable application of the illegal Ordinance to their respective projects.

42. Accordingly, Plaintiffs were denied equal protection under the laws.

PRAYER FOR RELIEF

Wherefore, Plaintiff Torromeo and Plaintiff MDR Corporation request that this Court:

(1) Find the Town liable for unconstitutionally taking Plaintiffs' respective properties without paying them just compensation;

(2) Order the Town to pay just compensation to Plaintiffs, with interest, from the date of each respective taking;

(3) Find the Town liable for depriving Plaintiffs due process and denying Plaintiffs equal protection;

(4) Order the Town to pay damages to plaintiffs under 42 U.S.C. § 1983;

(5) Order the Town of Fremont to pay Plaintiffs' attorneys' fees and costs;

(6) Order the Town of Fremont to award Plaintiffs other and further relief as this Court deems just and proper.

Date: November 5, 2003

Respectfully submitted,

Sumner F. Kalman #1303
Thea S. Valvanis #12214
147 Main Street, Box 988
Plaistow, NH 03865
(603) 382-4003

* * *

APPENDIX F

No. 02-1507

In the Supreme Court of the United States

HENRY TORROMEO AND MDR CORPORATION,
Petitioners,

v.

TOWN OF FREMONT,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

JOHN J. RYAN, ESQ.
Counsel of Record

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Counsel for Respondent

* * *

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* * *

* * *

Furthermore, the Petitioner's reliance on Nollan (Pet. at 13), is misplaced. Nollan involved a permit condition that required the landowner to dedicate land to the public, and it holds only that such compelled dedications warrant careful scrutiny because they present a heightened risk that the government might be sidestepping its constitutional obligation to acquire land upon the payment of just compensation. Nollan provides no support for Petitioners' argument that a permit denial under a procedurally defective land use ordinance engenders an automatic takings clause.

Finally, the Petitioner's reliance on Penn Central Transp. Co. v. City of New York, U.S. 104 (1978), is misplaced. The Petitioners fail to cite the Penn Central case or its holding in its New Hampshire Supreme Court proceedings; therefore any argument based on that case has been waived and is not properly before this Court. In addition the Petitioners fail to cite a single case from the U.S. Supreme Court or any other Court in which the kind of procedural defect found in this case was given any significant weight in takings analysis under Penn Central's "character of government action" prong or test.

* * *

APPENDIX G

THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham
No. 2001-612

HENRY TORROMEO

v.

TOWN OF FREMONT

MDR CORPORATION

v.

TOWN OF FREMONT

Argued: July 11, 2002

Opinion Issued: December 13, 2002

Sumner F. Kalman, Attorney at Law, P.C., of Plaistow (Sumner F. Kalman on the brief and orally), for the plaintiffs.

Casassa and Ryan, of Hampton (John J. Ryan on the brief and orally), for the defendant.

Susan Slack, of Concord, by brief, for the New Hampshire Municipal Association, as amicus curiae.

NADEAU, J. The defendant, the Town of Fremont (town), appeals orders of the Superior Court (McHugh and Abramson, JJ.), holding the town liable to the plaintiffs, Henry Torromeo and MDR Corporation (MDR), for damages caused by the town's denial of building permits pursuant to an invalid growth control ordinance. We reverse.

The trial court found, or the record discloses, the following facts. Torromeo is the developer of Mason's Corner, a twenty-seven lot residential subdivision in Fremont. The subdivision plan was approved by the town planning board and recorded in the Rockingham County Registry of Deeds in February 1997. In August 1999, when five lots in the subdivision remained unsold, the town stopped issuing building permits pursuant to its growth control ordinance. Torromeo and a prospective purchaser sued the town, seeking to require it to issue a building permit to the buyer. The Trial Court (Galway, J.) determined that the subdivision was exempt from the growth control ordinance under RSA 674:39, which provides, in part, that an approved and properly-recorded plat or site plan is exempt from subsequent zoning ordinance changes, except those expressly protecting public health standards, for four years from the date of recording. See RSA 674:39 (1996). The court enjoined the town from refusing to issue the requested permit.

MDR is the developer of Glidden Hill Estates, a fourteen lot subdivision in Fremont. MDR was issued five building permits, but was informed by the town that under the growth control ordinance, no more permits would be issued until April 2000. MDR sued the town, challenging the growth control ordinance. MDR argued that the ordinance was invalid because the town never legally adopted a capital improvement program (CIP), which is a prerequisite to the adoption of a growth control ordinance, see RSA 674:22 (1996). The Trial Court (Murphy, J.) agreed, ruling, among other things, that because the subject of the motion made at the 1987 town meeting regarding a CIP was not stated in the warrant, the motion was invalid. The court therefore ruled that a valid CIP was never

adopted and that the growth control ordinance was invalid ab initio. We summarily affirmed that decision on June 26, 2000. See MDR Corporation v. Town of Fremont, No. 2000-100 (N.H. June 26, 2000).

Following the dispositions of their respective cases in superior court, the plaintiffs filed separate actions against the town for damages caused by the temporary taking of their property from the time building permits were denied under the growth control ordinance until they were finally issued. Each plaintiff filed a motion for summary judgment on the issue of liability, arguing, among other things, that the town's liability was established by the prior decision in the MDR case that the growth control ordinance was invalid ab initio. The town objected, arguing that the plaintiffs had to show that the ordinance was unconstitutional, not merely invalid or unenforceable. The Trial Court (McHugh, J.) denied the motions.

MDR then filed a request for a ruling of law that the decision declaring the ordinance invalid ab initio also rendered it "unconstitutional per se," making it unnecessary to further prove that the ordinance was arbitrary or unreasonable. The trial court ruled:

> As this Court understands the dispute, the determination of whether or not the Growth Control Ordinance is or is not unconstitutional is not a prerequisite to the plaintiff claiming monetary damages, but those damages would be limited to economic losses due to its inability to build homes for the period of time that the Town refused to grant building permits.

The court ruled that MDR would have to prove unconstitutionality, however, in order to recover attorney's fees.

The town filed a motion for reconsideration, which the court addressed in an order dated March 19, 2001. In that order, the court joined the MDR and Torromeo cases by consent of the parties. It then sought to clarify its prior rulings on the takings issue, noting in hindsight that it should have granted the plaintiffs' motions for summary judgment on the issue of liability. It concluded:

> Call it what you will, this Court finds and rules that the plaintiff [sic] in both of these cases are entitled as a matter of law to recover damages for economic loss due to the Town's attempted enforcement of its invalid Growth Control Ordinance. In this Court's view those economic losses are compensable whether or not a "taking" occurred under existing case law.

A trial was held on the issue of damages and the Trial Court (Abramson, J.) awarded the plaintiffs the carrying costs and fair rental value on their unsold lots during the time the growth control ordinance prevented them from obtaining building permits. The town now appeals, contending that the trial court erred in ruling: (1) that the plaintiffs did not have to prove the unconstitutionality of the growth control ordinance in order to recover for a taking; and (2) that the plaintiffs could recover damages for loss of economic use of their property based solely upon the finding in the previous MDR case that the ordinance was invalid due to a procedural error.

"We will uphold the decision of the trial court unless it is unsupported by the evidence or is legally erroneous." Smith v. Town of Wolfeboro, 136 N.H. 337, 342 (1992). The town argues that the trial court erred in failing to distinguish between an ordinance that is unconstitutional and one that is merely unenforceable due to a procedural defect in its enactment. We agree.

The ruling in the first MDR case, which the plaintiffs claim establishes liability for damages, did not find the growth control ordinance unconstitutional, but rather void due to a procedural defect. The trial court stated as much in its order on MDR's request for ruling of law: "Declaring that the Ordinance cannot be applied to the plaintiff because it was not procedurally enacted correctly does not mean the Ordinance is substantively unconstitutional." In ruling that the plaintiffs could nevertheless recover damages, however, the trial court erred.

We have held that "arbitrary or unreasonable [zoning ordinance] restrictions which substantially deprive the owner of the economically viable use of his land in order to benefit the public in some way constitute a taking, within the meaning of our New Hampshire Constitution requiring the payment of just compensation." Burrows v. City of Keene, 121 N.H. 590, 598 (1981) (quotation omitted). We have, however, rejected claims for damages in zoning ordinance challenges in which it was determined that no taking or inverse condemnation occurred, see Soares v. Town of Atkinson, 129 N.H. 313, 317 (1987), or where the constitutionality of the regulation was not challenged, see Smith, 136 N.H. at 345. We have also distinguished an erroneous planning board decision based upon an otherwise valid regulation from "the application of an invalid regulation," and held that the former does not constitute a

compensable taking even though it may subject the property owner to a loss of value. Id. at 346; see also Dumont v. Town of Wolfeboro, 137 N.H. 1, 10 (1993). Rather, the owner's only remedy is reversal of the erroneous decision on appeal. See Smith, 136 N.H. at 346; Dumont, 137 N.H. at 10.

The plaintiffs argue that because the growth control ordinance was found to be invalid ab initio, this is a case of "the application of an invalid regulation" as discussed in Smith. We disagree. The context in which that term is used in Smith indicates that by "invalid regulation," we meant an unconstitutional one:

> An erroneous planning board decision based on sound authority must be distinguished from the application of an invalid regulation. An appeal of a mistaken board decision is an element of the governmental decision making process under RSA 677:15 (amended 1991). A declaration that an ordinance is unconstitutional is an extraordinary measure, designed to rectify a conclusory act of rule making that stripped a property owner of his or her rights.

Smith, 136 N.H. at 346.

Absent a determination that the ordinance is unconstitutional and constitutes a taking, this case presents merely the type of municipal error for which judicial reversal of the erroneous action is the only remedy. "Judicial, quasi-judicial, legislative or quasi-legislative acts of a town ordinarily do not subject it to claims for damages." Marino v. Goss, 120 N.H. 511, 514 (1980). Accordingly, we hold that the plaintiffs are not entitled to

damages, and that their only remedy is issuance of the erroneously-denied building permits.

Reversed.

BROCK, C.J., and DALIANIS and DUGGAN, JJ., concurred.

APPENDIX H

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

OCTOBER SESSION

NO.

MDR CORPORATION
&
HENRY TORROMEO

VS.

TOWN OF FREMONT

NOTICE OF APPEAL

CASASSA & RYAN
459 Lafayette Road
Hampton, New Hampshire
By:
John J. Ryan, Esquire

* * *

CASE TITLE (Full Name)
MDR Corporation v. Town of Fremont
and
Henry Torromeo v. Town of Fremont

APPEAL FROM:

Date of:
(a) Clerk's Notice: 9/26/01
(b) Sentencing (criminal):
(c) Probate Court filing:
Trial Judge; Master; Other:
Kenneth R. McHugh and Gillian L. Abramson
Court Reporter or Machine Operator: Catherine Handel
Docket No. below:
00-C-0256 and 00-C-0257
Trial counsel below:
For Plaintiff: Sumner Kalman, Esq.
For Defendant: John J. Ryan, Esq.

Which side is the moving party:
Defendant

* * *

* * *

BRIEF DESCRIPTION OF NATURE OF CASE AND RESULT:

These cases arose out of an earlier case, MDR Corporation v. Town of Fremont, 99-E0444, decided 12/17/99, Appendix at pp. 16-19 (appeal declined by Order of this Court dated June 26, 2000, Appendix at pg. 52)

In that case the Lower Court held that at its annual Town Meeting in 1987, the vote taken at that meeting did not properly authorize the Planning Board of Fremont to prepare a Capital Improvement Program, under RSA 674:5. The Court then held that the statutory requirement under RSA 674:22 requiring a Capital Improvement program as a basis for a growth control ordinance had not been met despite the actual existence of

capital improvement programs since 1987, and invalidated the Town's 1999 Growth Control Ordinance.

On March 21, 2000, the Plaintiffs in these cases brought actions for damages claiming inverse condemnation temporary loss of the use of the property during the period of April 1999 to the above date of June 26, 2000. See Appendix at pp. 1-9 and 86-97.

On August 24th and 25th, 2000 the Plaintiffs filed Motions for Summary Judgment on the issue of liability (Appendix at pp. 10-21 and 98-116) seeking an order that by reason of the decision in the first MDR case the Defendant was liable for inverse condemnation damages as a matter of law.

The Defendant responded with appropriate objections. Appendix at pp. 22-60 and 117-157.

On 10/3/2000 the Lower Court denied both Motions for Summary Judgment. Appendix at pg. 61 and 158.

In January 2001, the Plaintiff MDR filed a "Request for Ruling of Law", et al again seeking a determination that the Court rule that by reason of the 12/27/99 Order the 1999 Growth Control Ordinance was unconstitutional per se, Appendix at pp. 62-72. The Defendant objected to that Motion, Appendix at pp. 73-75. On January 21, 2001 the Lower Court issued its Order on Plaintiffs' Request for Ruling of Law. Appendix at pp. 76-78. In that Order the Lower Court held that the Plaintiff was not required to prove that the Ordinance was unconstitutional and that the 12/27/99 Order declaring the Ordinance procedurally defective was sufficient for Plaintiff to proceed to a determination of damages. The Defendant seasonably filed its Motion for Reconsideration. Appendix at pp. 79-82.

On March 21, 2001, the Lower Court issued its "Order". Appendix at pp. 159-165. In that Order the Lower Court consolidated the two cases, clarified its previous Order of January 17, 2001 and allowed the Plaintiffs to proceed to a

hearing on damages, while also preserving the Defendants right to contest the Court's findings regarding liability.

On June 27, 2001, the "damage" portion of the case was heard. On September 26, 2001, the Lower Court issued its decision awarding the Plaintiff MDR, the sum of $71,600 and awarding the Plaintiff Torromeo the sum of $23,800. Appendix at pp. 165-177. The Lower Court again noted the Defendant's ability to appeal the issue of liability.

The Defendant has filed its Motion for Reconsideration of Finding with regard to one factual issue. Appendix at pp. 178-180. A ruling was issued on 10/15/01. Appendix at pp. 182-183.

The Defendant hereby appeals the findings and rulings of the Lower Court regarding the issue of whether the Defendant can be liable for inverse condemnation temporary taking damages for loss of the use of property where there was no finding that the 1999 Growth Control Ordinance was unconstitutional.

STATUTE, ORDINANCE, REGULATION, RULE, OR OTHER LEGAL AUTHORITY UPON WHICH THE CLAIM OF CIVIL OR CRIMINAL LIABILITY WAS BASED:

Decision of Rockingham County Superior Court dated 12/27/00 MDR Corporation v. Town of Fremont, 99-E-0444. Appendix at pp. 16-19.

(Deemed by Lower court in instant cases as the "law of the case"). See Appendix at pg. 177.

SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. SEE RULE 7(2). STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE RULE 16(3)(b).

The Lower Court found that the defect in the 1999 Growth Control Ordinance enactment process was rooted in a 1987 procedural error. The Lower Court also found that the Town was not guilty of bad faith, and that the Plaintiffs were not entitled to attorneys fees. The Lower Court did not find that the 1999 Growth Control Ordinance itself was unreasonable, arbitrary or irrational and did not find that the Ordinance bore no substantial relationship to the health, safety, morals or welfare of the Town, or that the Ordinance was unconstitutional.

In light of the above, the issues raised in this Appeal are as follows:

1. Was the Lower Court in error in its ruling that the Plaintiff were not required to prove that the 1999 Growth Control Ordinance was unconstitutional in order to recover inverse condemnation "taking" damages for temporary loss of economic use of property.

2. Was the Lower Court in error in ruling that the Plaintiffs were entitled to claim temporary loss of economic use of property damages solely on the basis of the Court's holdings in the first MDR case that the Ordinance was invalid by reason of a procedural defect.

WITH REFERENCE TO EACH SPECIFIC QUESTION RAISED ON APPEAL, IDENTIFYING THE QUESTION BY ITS NUMBER, SPECIFY:

(A) The proper standard of review to be applied by the court to the question, citing relevant authority;

(B) The parts of the proceeding you would designate the court reporter to transcribe, or whether an adequate written substitute could be provided in place of a transcript; and

(C) The case(s) most relied upon to support the moving party's position:

Question #1.

A. Whether the Lower Court's rulings are erroneous as a matter of law. Unit Owners Association of Sumit Vista Lot 8 Condominium v. Miller, 141 NH 39 (1996)

Legal conclusions are reviewed independently for plain error Olbres v. Hampton Cooperative Bank, 142 NH 227 (1997).

B. Adequate written substitute could be provided in place of a transcript.

C. Burroughs [sic] v. Keene, 121 NH 590 (1981). Plaintiffs must prove unconstitutional abuse of power as a pre-requisite to a claim for "taking" damages, such as alleged by the Plaintiffs, and awarded under Lower Court Order of 9/26/01. Appendix at pp. 165-177.

Busky v. Town of Hanover, 133 NH 318 (1990). Under New Hampshire constitutional law, Ordinances will not be declared unconstitutional unless Plaintiff proves that the Ordinance provisions themselves are arbitrary and unreasonable and have no relation to the health, safety, morals or general welfare of the community.

Opinion of the Justices, 117 NH 749 (1977). Laws affecting economic interests which are directed to fulfilling the public interest or general welfare are constitutional unless wholly irrational.

Question #2

A. Whether the Lower Court's rulings are erroneous as a matter of law. Unit Owners Association of Sumit Vista Lot 8 Condominium v. Miller, 141 NH 39 (1996).

Legal conclusions are reviewed independently for plain error Olbres v. Hampton Cooperative Bank, 142 NH 227 (1997).

B. Adequate written substitute could be provided in place of a transcript.

C. Dugas v. Conway, 125 NH 175 (1984). Ordinances must be found to violate Part I Article 12 of the New Hampshire Constitution in order to constitute a taking such as alleged by the Plaintiffs, and awarded under Lower Court Order of 9/26/01. Appendix at pp. 165-177. Mere procedural error is not sufficient to establish unconstitutional taking. Finding of unconstitutionality required in takings cases.

* * *

A DIRECT AND CONCISE STATEMENT OF THE REASONS WHY A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE QUESTIONS AND WHY THE ACCEPTANCE OF THE APPEAL WOULD PROTECT A PARTY FROM SUBSTANTIAL AND IRREPARABLE INJURY, OR PRESENT THE OPPORTUNITY TO DECIDE, MODIFY, OR CLARIFY AN ISSUE OF GENERAL IMPORTANCE IN THE ADMINISTRATION OF JUSTICE:

The New Hampshire Supreme Court has never held that inverse condemnation damages can be recovered in land use cases absent a finding that the Ordinance or Regulation in question is unconstitutional. The Lower Court's rulings that a finding of unconstitutionality is not a prerequisite to takings cases is contrary to established New Hampshire precedent.

The Town of Fremont has been subjected to a Court Order requiring it to pay $95,400 in takings damages solely on the basis of a 1987 procedural defect in its capital improvement enactment Warrant Article vote.

Acceptance of this Appeal will protect the Town from the substantial and irreparable injury of liability to the Plaintiffs for the above amount.

This Appeal is of great importance to all municipalities in New Hampshire. Unless this Appeal is accepted, all towns and cities in the State will be subject to a claim for inverse condemnation damages where any procedural irregularity exists in the enactment of any land use ordinance or regulation.

* * *

CERTIFICATIONS

1. I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

/s/_____
Counsel

2. I hereby certify that copies of this notice of appeal have been served on all parties to the case and have been filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

/s/_____
Moving Party or Counsel

APPENDIX I

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Henry Torromeo
v.
Town of Fremont

00-C-0256

MDR Corporation

v.
Town of Fremont

00-C-0257

ORDER

In these consolidated cases, plaintiffs seek monetary damages for lost development and real estate profit suffered after the Town of Fremont imposed and maintained an invalid interim growth control ordinance in March 1999.

In December 2000, the Court (Murphy, J.) ruled that the Town's original growth control ordinance was invalid ab initio for failing to comply with the statutory requirements of RSA 674:22. See MDR Corp. v. Town of Fremont, Rockingham Co. Super. Ct. No. 99-E-644. Notwithstanding this Court order, the Town continued to implement its ordinance and refused to issue building permits to both plaintiffs in these cases, which would have allowed them to build residential homes on pre-approved

subdivision lots for prospective buyers. These lawsuits followed.

On March 19, 2001, the Court (McHugh, J.) granted plaintiffs' Motions for Summary Judgment on Liability, finding that plaintiffs were entitled to recover damages for their economic loss as a matter of law because defendants continued to impose their invalid ordinance preventing development. The Court ruled that the economic losses were compensable whether or not a "taking" occurred under existing case law and scheduled an evidentiary hearing on the issue of plaintiffs' economic damages. From the testimony and exhibits presented at the evidentiary hearing, the Court finds and rules as follows:

Plaintiffs are developers of two residential subdivisions in the Town of Fremont. Henry Torromeo and his company, Torromeo Industries (collectively "Torromeo"), developed the Mason's Corner Subdivision, which consists of 27 lots for single family homes. The Fremont Planning Board approved this subdivision for development. Torromeo then filed the approved plan in the Rockingham County Registry of Deeds in February 1997. Torromeo bought this subdivision and acquired its development rights in August 1998.

In January 1999, Torromeo bonded the subdivision project with the Town and began selling lots to builders. The builders then found buyers for the lots, obtained building permits, and began building on each lot in January 1999. By March 1999, when the Town imposed the permanent growth control ordinance, Torromeo had sold 11 out of 27 subdivision lots, to three different builders. However, the Town revoked previously issued building permits on at least two of these lots for the builders' failure

to complete substantial construction. This revocation of permits and new substantial construction policy for retention of building permits, caused builders to be wary of purchasing lots in the subdivision. The asserted reasoning for this decline was that builders would not buy lots that they could not develop according to their own timelines, or, develop at all. Sales continued to gradually decline, and by August 1999 five lots remained unsold. By August 26, 1999, the Town refused to issue further building permits, because its growth control ordinance prohibited their issuance and its maximum capacity for permits had been reached. With no permits available, Torromeo was unable to sell any of the five remaining lots until February 2000, when building permits again were issued.

Torromeo now seeks damages consisting of the fair rental value of his lots from March 1999, when the invalid ordinance took effect, through February 2000, when his remaining lots sold. He additionally seeks carrying costs for each of the five lots, which consist of property taxes, fees to extend letters of credit, insurance costs, accounting costs, and opportunity costs.

Torromeo's project manager and cousin, Vincent Iacozzi, also seeks damages in this action. He asserts that Torromeo promised to sell him Lot #9 in the subdivision, at an extremely discounted rate, and that this lot would be available in May 1999. In reliance, Mr. Iacozzi applied for a building permit for Lot #9 and placed his own home on the market, expecting that the building permit would be issued. Subsequently Mr. Iacozzi's home sold, but the Town denied his building permit. This caused Mr. Iacozzi to incur alleged damages for storing his possessions and renting a home from December 1999 until August 2000, when his home in Mason's Corner was finally completed.

The evidence shows that Mr. Iacozzi did not take title to Lot #9 until June 2001, and that he knew of the problems with the growth control ordinance throughout his tenure as project manager for Torromeo Industries. Moreover, the evidence shows that Mr. Iacozzi did not purchase the lot for fair market value, and, he has never intervened as a party in this case. Finally, Mr. Iacozzi has not alleged any actions by the Town that prevented him from purchasing a lot for fair market value and obtaining a building permit elsewhere. Accordingly, the Court rules that Mr. Iacozzi's alleged damages are too speculative and too tenuously connected to this case to be determined by the Court.

MDR Corporation, in contrast, was developing a subdivision in Fremont designated as Glidden Hill Estates. The subdivision plan for Glidden Hill Estates consisted of 14 lots for single family homes. The Fremont Planning Board approved this subdivision plan in May 1999. MDR subsequently recorded the plan in the Rockingham County Registry of Deeds in August 1999. After planning board approval but prior to recordation, MDR obtained bonding of the project with the Town, built and paved roads within the subdivision, and began marketing the lots for sale to builders. MDR then applied for, and was granted, five building permits. However, the Town then informed MDR that no further permits would be issued until April 2000 due to the growth control ordinance.

The growth control ordinance ultimately prevented MDR from selling the remaining nine lots in its subdivision for almost one year. Again, the bar to selling the lots was that builders would not buy land on which they could not build. MDR subsequently brought suit in this Court to enjoin the Town from enforcing this ordinance and to

declare the ordinance unconstitutional. This suit led to the above-referenced ruling, that the ordinance was invalid ab initio, for failure to comply with statutory requirements for its imposition. MDR Corp. v. Town of Fremont, Rockingham Co. Super. Ct. No. 99-E-644 (Murphy, J.) (decided December 2000). MDR ultimately received building permits and sold its nine remaining lots by sometime in June 2000. MDR now seeks the fair rental value of its nine lots from August 1999 through June 2000, as well as the same carrying costs itemized by Torromeo above.

The Court finds and rules that both Torromeo and MDR are entitled to recover damages beginning on August 26, 1999, the date that building permits were no longer available under the invalid growth control ordinance. Contrary to plaintiffs' position, the Court finds that the existence of an invalid growth control ordinance itself does not cause damage. Damage occurs only when the growth control ordinance actually prohibits plaintiffs from receiving building permits. Here, the undisputed testimony shows the damage began on August 26, 1999. Because the building permits were no longer available as of this date, the properties were unmarketable to builders and plaintiffs then suffered damage. See Prudhomme v. Flanagan, [sic] 138 N.H. 561, 575 (1994) (finding that damage occurs only when plaintiff can take no further action to improve its own position). Accordingly, the Court rules that Torromeo is entitled to the carrying costs and fair rental value for his five lots from August, 26, 1999 through February 2000 (six months) and MDR is entitled to the same damages for its nine lots from August 26, 1999 through June 2000 (ten months).

MDR and Torromeo retained Joseph G. Fremeau, MAI, and Fremeau Appraisal, Inc., to provide the Court with an expert assessment of their damages. Mr. Fremeau presented the Court with an expert appraisal of plaintiffs' properties, calculating a fair rental value for each lot involved and itemizing all relevant carrying costs. The Town, in turn, retained John M. Crafts, MAI, and Crafts Appraisal Associates, Ltd., to provide the Court with an alternative analysis of plaintiffs' damages.

Mr. Crafts reviewed the Fremeau report and used substantially the same methodology as Mr. Fremeau in arriving at his own appraisal. The only differences in the two appraisal reports are the appropriate market rental rate of return for single family homes and the appropriate time period for which rental value should be calculated. The Court finds that Mr. Crafts agrees with Mr. Fremeau, by not presenting contrary data, on both the market values for the MDR properties and the carrying costs of each plaintiffs' properties. The Court previously ruled above on the appropriate time period for damages sustained by each plaintiff, finding that the rental period would begin for each plaintiff on August 26, 1999. Accordingly, the only remaining issue in dispute is the appropriate rental value of the properties.

Both experts agreed that the proper method of valuation for the undeveloped subdivision lots was the income capitalization approach based upon the lots' fair market rental value. See In re City of Nashua, 138 N.H. 261, 265 (1998). They arrived at this determination due to the temporary nature of plaintiffs' damages. The experts further agreed that single family building lots are not typically rented on the open market. Thus, comparable rentals were unavailable for comparison in their damage analysis. Accordingly, the experts agreed that the

appropriate market rental value must be calculated by applying the appropriate rate of return to the actual fair market value of the property.

The parties agree that the fair market value of MDR's nine Glidden Hills Estates subdivision lots was $660,000. Accordingly, the Court will not disturb this valuation. However, Mr. Fremeau found the value of Torromeo's five Mason's Corner subdivision lots to be $250,000, while Mr. Crafts found their value to be $230,000. Mr. Crafts' estimation of fair market value is derived from the actual sales prices of the five Mason's Corner lots in February 2000. In contrast, Mr. Fremeau's estimation of their fair market value came from comparable sales of similar lots at $50,000 per lot. The Court finds that Mr. Crafts' appraisal is based upon actual market data and that Mr. Fremeau's opinion that one lot sold at less than fair market value is not supported by raw data. Because the expert appraisal values are close in number, the Court presumes that the sale price of the fifth lot is a reasonable estimation of its fair market value, and it is documented with raw data. Accordingly, the Court adopts Mr. Crafts' $230,000 fair market value estimate for the Mason's Corner lots.

However, the Court adopts Mr. Fremeau's 12% market rate of return, to be applied to these values in determining appropriate market rent. Mr. Fremeau clearly and credibly explained his calculation of this percentage, which was substantiated upon real data in the commercial market. Mr. Fremeau looked to the average rate of return for retail and restaurant sites in the surrounding area, and found that the average rate of return for commercial property hovered somewhere around 10%. Specifically, he compared fast food establishments to gas stations in the surrounding area. Mr. Fremeau then looked to the rate of

return on low-risk CD's and Treasury Bills, and learned that this rate hovered around 7%. He further determined that home and commercial mortgage rates in the Fremont area hovered around 9.5%; higher risk stocks received a rate of return greater than 12%; and the Standard and Poor's (S&P) Index had increased more than 12% between mid 1999 and mid 2000. Based upon these averages, and the booming New Hampshire real estate market, Mr. Fremeau determined that a residential lot would receive a slightly higher rate of return, due to its slightly higher market risk on the rental market than would commercial property. Thus, he added two percent to the average commercial rate of return, which also was consistent with the 12% increase in the S&P annual index.

In contrast, Mr. Crafts found that a 7.5% rate of return was more appropriate for the subdivision lots at issue. Mr. Crafts looked to the Town of Fremont bond rating, the commercial lending rate for the Town of Fremont, and additional tax exempt issues within the Town. Mr. Crafts then multiplied these numbers by a 30% tax factor and arrived at an after-tax rate of approximately 5%. Recognizing that the undeveloped lots under an approved subdivision plan would require some sort of management and upkeep, Mr. Crafts then added 2.5% to the 5% rate to arrive at his final rate of return.

The Court finds Mr. Fremeau's analysis of rates of return to be much more clear, credible, concise, and substantiated upon, real data in the commercial real estate market. Further, Mr. Fremeau's analysis comports with a reasonable person's estimation in a real estate transaction during a booming real estate market. The Court finds that Mr. Crafts' analysis is not premised upon any form of

comparable rates of returns and is far too speculative to be adopted. Accordingly, the Court adopts Mr. Fremeau's application of 12% as the appropriate rate of return to apply to the fair market values of the fourteen lots.

Applying this rate of return to the fair market value, the experts testified that the resulting number must be divided by twelve to arrive at a monthly rental rate. Then, this monthly rate is multiplied by the number of months that each plaintiff is entitled to receive a fair rental value. Under this analysis and the rulings enumerated above, the following charts summarize the expert appraisals and the Court's award consistent with the above findings and rulings:

	MDR PROPS. Rental Value	TORROMEO PRPS Rental Value	MDR - Costs	TORROMEO Costs
FREMEAU APPRAISAL	$660,000*.12 =$79,200/12mo $6,600*10mo =$66,000 FRV	$250,000*.12 =$30,000/12mo =$2,500*6mo =$15,000 FRV	$5,600	$10,000
CRAFTS APPRAISAL	$660,000*.075 =$49,500/12mo =$4,125*10mo =$41,250 FRV	$230,000*.075 =$17,250/12mo =$1,438*6mo =$8,628 FRV	$5,600	$10,000
COURT ORDER	$660,000*.12 =$79,200/12mo =$6,600*10mo **=$66,000 FRV**	$230,000*.12 =$27,600/12mo =$2,300*6mo **=$13,800 FRV**	**$5,600** UNDIS-PUTED	**$10,000** UNDIS-PUTED

For the reasons stated, and based upon the above calculations, the Town is ORDERED to pay Mr. Torromeo $23,800.00 as the appropriate fair rental value and carrying costs for his five unbuildable lots. The Town is further ORDERED to pay MDR Corporation $71,600.00 as its appropriate fair rental value and carrying costs for its nine unbuildable lots. These damages are appropriate based upon the Town's continued imposition of its invalid growth ordinance, which prevented plaintiffs from selling or developing their remaining lots.

Each party has submitted requests for findings of fact and rulings of law. In light of the narrative discussion above, the Court rules upon plaintiff's requests for findings of fact and rulings of law on the Mason's Corner Subdivision as follows:

GRANTED: 1-14; 19-22;

DENIED: 15-18; 24-25 (see decision);

NEITHER GRANTED NOR DENIED: 23 (see decision).

The Court rules upon plaintiff's requests for findings of fact and rulings of law on the Glidden Hill Subdivision as follows:

GRANTED: 1-13; 17-20;

DENIED: 14-16;

NEITHER GRANTED NOR DENIED: 21-22 (see decision).

The Court rules on the Town's requests for findings of fact and rulings of law as follows:

GRANTED: 3-7; 10; 12-13; 21; 26-27; 30;

DENIED: 1-2 (see Order March 19, 2001 (McHugh, J.)); 8; 9 (see decision); 17-20; 28-29; 31-34;

NEITHER GRANTED NOR DENIED: 14-16 (see decision); 22-25 (see decision and Order (Murphy, J.) in 99-E-644).

The Court rules on the Town's requests for relief as follows:

GRANTED: B;

DENIED: C-G;

NEITHER GRANTED NOR DENIED: A. (The Court will not reverse the prior ruling of law relating to liability in this case. Judge McHugh revisited this issue three times and thoroughly explained his ruling. This ruling is the law governing this case which the Town may appeal at the conclusion of this litigation) (See Order (McHugh, J.) (dated March 19, 2001)).

So ORDERED.

DATE: September 26, 2001

/s/ Gillian Abramson
GILLIAN L. ABRAMSON
Presiding Justice

APPENDIX J

THE STATE OF NEW HAMPSHIRE
ROCKINGHAM, SS. SUPERIOR COURT

00-C-257
MDR Corporation

v.

Town of Fremont

00-C-256
Henry Torromeo

v.

Town of Fremont

ORDER

The purpose of the within Order is to clarify the issues in these related cases. Although these two cases have never been formally joined, the Court now does so by consent of the parties. Counsel now agree that because the issues raised in these two lawsuits are identical and because the lawyers are the same as well as the witnesses, these cases should be tried together.

Both of these lawsuits were brought as a direct result of a ruling made in case number 99-E-444, MDR Corporation v. Town of Fremont. In that case the Court (Murphy J.) found and ruled that the defendant's Growth Control Ordinance enacted in March of 1987 was invalid ab initio for failing to comply with the statutory requirements of RSA 674:22. Thus because of a procedural defect in the

enactment of the Ordinance, it had no validity. Notwithstanding that fact, the Town implemented the Ordinance and refused both plaintiffs in these cases building permits to enable them to construct residential homes for their perspective buyers.

Both plaintiffs have brought lawsuits seeking monetary compensation for the lost profits that they have suffered as a result of the defendant's implementation of its invalid Growth Control Ordinance. Shortly after the lawsuits were brought, both plaintiffs filed Motions for Summary Judgment on the issue of liability. They argued that because Judge Murphy's determination that the Growth Control Ordinance was invalid, said determination having been affirmed on appeal to our Supreme Court, there were no disputed issues regarding liability. In the defendant's objection to both Motions for Summary Judgment, it took the position that merely because the Growth Control Ordinance was defective procedurally did not mean that it was substantively unconstitutional. The defendant argued that unless a finding was made that the ordinance was substantively unconstitutional then the plaintiffs were not entitled to any monetary damages.

By order dated October 3, 2000, this Court denied both plaintiffs' Motions for Summary Judgment on liability. It accepted the defendant's argument that the question of whether or not the ordinance was substantively unconstitutional was still an open question because Judge Murphy's Order did not address it.

Upon receipt of this Court's Order denying the Motion for Summary Judgment, the plaintiff in 00-C-257 filed a Request for Ruling of Law. In that pleading the plaintiff suggested that the fundamental question to be

addressed is not whether the ordinance was substantively unconstitutional, but rather whether the defendants refusal to issue building permits based upon the procedurally invalid Growth Control Ordinance constituted a "taking" of the plaintiff's property as that term is defined under case law. The plaintiff suggested that under case law such a taking did occur for which it was entitled to monetary damages.

By Order dated January 17, 2001, this Court in part agreed with the plaintiff's position. It ruled that "the determination of whether or not the Growth Control Ordinance is or is not unconstitutional is not a prerequisite to the plaintiff claiming monetary damages but those damages would be limited to economic losses due to its inability to build homes in the period of time that the Town refused to grant building permits". However the Court in effect imposed a higher standard on the plaintiff if it sought to recover other damages in addition to economic loss such as attorney fees.

Upon receipt of the Court's January 17, 2001 Order, the defendant filed a Motion for Reconsideration. In the motion the defendant argued that the substance of the Court's October 5, 2000 denial of the plaintiff's Motion for Summary Judgment on liability and its Order of January 17, 2001, could not be reconciled. While the Court does not agree with the defendant's interpretation of its two prior Orders, it does agree that some clarification is necessary.

The parties have a dispute as to whether or not a legal "taking" has occurred with respect to the defendant's implementation of it [sic] what has been determined to be its invalid Growth Control Ordinance back in 1987. The plaintiff argues that under case law a "taking" did occur; the

defendant argues that under the same case law no "taking" resulted.

In the Court's mind, the issue transcends what constitutes a legal "taking". The defendant concedes that for a period of time it refused to allow either of these plaintiffs to obtain building permits based upon what has later been found to be an invalid implementation of its Growth Control Ordinance. Call it what you will, this Court finds and rules that the plaintiff in both of these cases are entitled as a matter of law to recover damages for economic loss due to the Town's attempted enforcement of its invalid Growth Control Ordinance. In this Court's view those economic losses are compensable whether or not a "taking" occurred under existing case law. It is unconscionable for a municipality to take the position that no damages should be paid when its ordinance restricting building has been determined to be invalid and when the implementation of that Ordinance resulted in provable monetary losses to the plaintiffs.

In retrospect the Court determines that the plaintiffs' Motions for Summary Judgment on liability should have been granted when they were initially filed. Under the within ruling the plaintiffs shall be permitted to place evidence before the Court on their respective claims for economic loss without addressing at all the issue of liability. The plaintiffs do not allege that the defendant is guilty of bad faith in the implementation of its Growth Control Ordinance, however bad faith does not have to be proven if the damages sought are limited to economic loss.

Because of the potential for confusion as a result of this Court's past Orders it determines that the defendant's objection to its findings of liability as a matter of law is

timely made and shall be ripe for appeal at the conclusion of the damage phase of this litigation.

Both of these cases have been scheduled for a bench trial with 00-C-257 scheduled on March 28, 2001 and 00-C-256 scheduled on May 1, 2001. Both of those scheduled trials are continued because counsel agree that the cases can be heard together. This Court stands ready to try these cases in either May or June. The Court will be presiding in Belknap County for the month of July and August thus counsel are requested to review their respective calendars for the month of May and June and select a date certain for the one-day trial of these cases and notify the Court within the next ten days.

So ORDERED.

DATE: March 19, 2001

/s/ Kenneth McHugh
Kenneth R. McHugh
Presiding Justice

APPENDIX K

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 2000-100, MDR Corporation v. Town of Fremont, the court upon June 26, 2000, made the following order:

The court having reviewed the notice of appeal and appendix, the decision below is summarily affirmed in accordance with Rule 25(1)(b) on the basis that the trial court has issued an opinion identifying and discussing the issues presented, and the court does not disagree with the opinion. Plaintiff's motion for summary affirmance or, in the alternative, for dismissal or declination is, therefore, moot.

Brock, C.J., and Horton and Broderick, JJ., did not participate; Groff, Mangones, and Mohl, JJ., superior court justices, participated by special assignment under RSA 490:3.

Distribution:

Clerk, Rockingham County Superior Court 99-E-0444
Sumner Kalman, Esquire
John J. Ryan, Esquire
Honorable Walter L. Murphy
Donna K. Nadeau, Supreme Court
File

Howard J. Zibel,
Clerk

APPENDIX L

The State of New Hampshire

SUPERIOR COURT

ROCKINGHAM COUNTY (X) COURT
( ) JURY

WRIT OF SUMMONS

MDR Corporation
163 Kingston Road
Danville, New Hampshire 03819

v.

Town of Fremont
PO Box 120, 295 Main Street
Fremont, New Hampshire 03044

* * *

ATTACHMENT

In a plea of law, whereas, Plaintiff, MDR Corporation ("Plaintiff') is the owner of Lots 03-191.01, 03-191.02, 03-191.05, 03-191.06, 03-191.07, 03-191.08, 03-191.09, 03-191.11 and 03-191.12 located in Fremont, New Hampshire;

That Defendant, Town of Fremont ("Defendant") as of August 1999 denied building permits to Plaintiff for each of the said lots based on Growth Control Limitations enacted by the Planning Board on April 14, 1999;

That on December 27, 1999 the Rockingham County Superior Court (Murphy, J) decided in the case of MDR Corporation v. Town of Fremont, Docket No. 99-E-0444 that "the Growth Control Ordinance, therefore is invalid ***ab initio*** for failing to comply with the statutory requirements of RSA 674:22";

That on February 23, 2000, the Fremont Planning Board enacted restrictions for the issuance of building permits to replace the restrictions enacted on April 14, 1999, pursuant to the "invalid" growth control ordinance (see exhibit "A", attached and incorporated by reference herein);

That according to those restrictions, the Town will not issue Plaintiff any permits until June 15, 2000, at the earliest;

That if the total number of permits issued as of June 15, 2000 exceeds 26, Plaintiff will not be entitled to any building permits for the year beginning March 15, 2000 and ending March 15, 2001;

That by applying the Growth Control Ordinance and refusing to issue building permits, the Town has and

continues to effectuate a temporary "taking" of Plaintiff's property from the point in time when the building permits were denied to the point in time when the permits are ultimately issued;

Takings, whether permanent or temporary, entitle Plaintiff to compensation. Burrows v. City of Keene, 121 NH 590(1981);

The Fifth Amendment of the United State Constitution provides "nor shall private property be taken for public use without just compensation." Similarly, Pt. 1, Art. 12 of the New Hampshire Constitution states "All men have certain natural, essential and inherent rights - among which are...acquiring, possessing, and protecting property...But no part of a man's property shall be taken from him, or applied to public uses, without his own consent...";

"Under the Just Compensation Clause, where the government has "taken" property by a land-use regulation, the landowner may recover damages for the time before it is finally determined that the regulation constitutes a "taking" of his property." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

"...A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provisions with respect to compensation..." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

"The doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. "Temporary" regulatory takings which, as here, deny a landowner all use of his property, are not different in kind from the permanent takings for which the Constitution clearly requires compensation..."

First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

"Where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. Invalidation of the ordinance without payment of fair value for the use of the property during such period would be a constitutionally insufficient remedy." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

"A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

That the Town has filed a Notice of Appeal with the Supreme Court. As of the date of this writ, the appeal has not been accepted or declined. As a result, the Town continues to enjoy the enforcement of an illegal Growth Control Ordinance.

Plaintiff continues to suffer substantial monetary damages as a result of the Town's refusal to issue building permits under these circumstances.

All to the damage of Plaintiff in an amount to be determined as soon as all of Plaintiff's building permits have been issued and the outcome of the appeal determined and within the jurisdictional limits of this Court.

APPENDIX M

The State of New Hampshire

SUPERIOR COURT

ROCKINGHAM COUNTY (X) COURT
( ) JURY

WRIT OF SUMMONS

Henry Torromeo
92 Pond Street
Methuen, Massachusetts 01844

v.

Town of Fremont
PO Box 120, 295 Main Street
Fremont, NH 03044

* * *

ATTACHMENT

In a plea of law, whereas, Plaintiff, Torromeo Industries, Inc. ("Plaintiff") is the owner of Lots 12, 12-01, 12-08, 12-09 and 12-20 in the Mason's Corner Subdivision in Fremont, approved by the Fremont Planning Board, recorded at the Rockingham County Registry of Deeds on February 6, 1997 and "vested" pursuant to RSA 674:39;

That Defendant, Town of Fremont ("Defendant") denied building permits to Plaintiff for those lots based on Growth Control Limitations enacted on April 14, 1999;

That the Town established an interim growth control ordinance/building permit limitation at Town Meeting in March of 1998. The Fremont Board of Selectmen stated by letter that Mason's Corner is exempt from said ordinance. Growth control and permit limitations were later enacted on April 14, 1999 which place restrictions on "vested" lots;

That "vested lots" pursuant to RSA 674:39 "are exempt from all subsequent changes in ...zoning ordinances adopted by any ...town...for a period of four years..." (emphasis added);

In August, 1999 Plaintiff was denied building permits for his five lots based on the Growth Control Limitations enacted on April 14, 1999;

That on December 27, 1999 the Rockingham County Superior Court (Murphy, J) decided in the case of MDR Corporation v. Town of Fremont, Docket no. 99-E-0444 that "The Growth Control Ordinance, therefore is invalid ***ab initio*** for failing to comply with the statutory requirements of RSA 674:22. This case is on appeal to the

New Hampshire Supreme Court, but is not dispositive to this cause of action;

That on February 2, 2000 the Rockingham County Superior Court (Galway, J) decided in the case of Torromeo Industries, Inc., et al v. Town of Fremont, Docket No. 99-E-0536 that "RSA 674:22 applies to growth management generally, but not to those subdivisions protected by the four year exemption period of RSA 674:39...". No appeal has been taken flow this decision;

That by applying the Growth Control Ordinance and refusing to issue any building permits, the Town effectuated a temporary "taking" of Plaintiff's property from the point in time when the building permits were denied to the point in time when the permits were ultimately issued. Permits for lots 12, 12-01, 12-08 and 12-20, though dated November 13, 1999, were not issued until February 10, 2000; the permit for lot 12-09, though dated September 29, 1999, was not issued until February 5, 2000. (Permits marked exhibit "A," attached and incorporated by reference herein);

Takings, whether permanent or temporary, entitle Plaintiff to compensation. Burrows v. City of Keene, 121 NH 590(1981);

The Fifth Amendment of the United State Constitution provides "nor shall private property be taken for public use without just compensation." Similarly, Pt. 1, Art. 12 of the New Hampshire Constitution states "All men have certain natural, essential and inherent rights - among which are...acquiring, possessing, and protecting property...But no part of a man's property shall be taken from him, or applied to public uses, without his own consent...";

"Under the Just Compensation Clause, where the

government has "taken" property by a land-use regulation, the landowner may recover damages for the time before it is finally determined that the regulation constitutes a "taking" of his property." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

"...A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provisions with respect to compensation..." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

"The doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. "Temporary" regulatory takings which, as here, deny a landowner all use of his property, are not different in kind from the permanent takings for which the Constitution clearly requires compensation..." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

"Where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. Invalidation of the ordinance without payment of fair value for the use of the property during such period would be a constitutionally insufficient remedy." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

"A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987);

Mason's Comer consists of approximately twenty-

seven (27) lots. Substantial development has occurred (twenty two building permits have been issued), and this subdivision can not be affected by Growth Control Ordinances enacted after its approval; i.e. February 6, 1997;

The Town, by applying the illegal Growth Control Ordinance, effectuated a "taking" of all Plaintiff's use of its property;

Plaintiff suffered substantial monetary damages as a result of the Town's refusal to issue building permits under these circumstances.

All to the damage of Plaintiff in an amount to be determined within the jurisdictional limits of this Court.

APPENDIX N

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Torromeo Industries, Inc.& Vincent Iacozzi

v.

Town of Fremont

99-E-536

ORDER

Before the Court is the Plaintiffs' Petition for Declaratory Judgment Pursuant to RSA 491:22; Bill in Equity; Petition for Permanent Injunction; and Writ of Mandamus. This case arises out of the Town of Fremont's ("the Town") decision to deny plaintiff Vincent Iacozzi's request for a building permit. The Court conducted a final hearing on January 27, 2000.

For purposes of this Order, the Court finds the following facts. Plaintiff Torromeo Industries, Inc. ("Torromeo") owns a parcel of land located in Fremont, New Hampshire known as Mason's Corner. The land is subject to a subdivision plan that was approved by the Town Planning Board and registered with the Rockingham County Registry of Deeds on February 6, 1997. In March 1998, the Town enacted a one-year-long Interim Growth Management Ordinance that restricted the number of building permits to be awarded during that period. Since the enactment of the Interim Ordinance, the Town has awarded

building permits for twenty-two (22) of the twenty-seven (27) lots that comprise Mason's Corner.

In a letter dated March 18, 1999, the Town Board of Selectmen informed the plaintiffs that "it is our decision at this time that the Mason's Corner Subdivision project off of North Road in Fremont is exempt from the Interim Growth Management Ordinance under RSA 674:39." Plaintiffs' Exhibit 2. At the first session of the March 1999 Town Meeting, the Town passed a Growth Management and Land Use Control Ordinance that imposed permanent restrictions on the number of building permits to be issued in any given year.

On April 14, 1999, pursuant to the growth management ordinance passed at the March 1999 Town meeting, the Town Planning Board enacted "Growth Control and Permit Limitations." These limitations provided that, for the period between April 14, 1999 and April 13, 2000, three (3) permits would be issued to lot owners "who do not have vested rights" and twenty-six (26) permits would be issued to all other lot owners. See Defendant's Exhibit B. In addition, the Planning Board granted an unlimited number of building permits during the period from April 14, 1999 until June 15, 1999 to any lot owners with "vested" rights, provided that the permits must be acted on within thirty (30) days of issuance. Id.

Plaintiff Iacozzi sold his house in Londonderry, New Hampshire on August 25, 1999, with the intention of purchasing Lot 9 in the Mason's Corner subdivision and building a new house there. To that end, Iacozzi applied for a building permit on September 23, 1999. Citing the Town's Growth Control and Permit Limitations, the Town denied his request thirty days later, stating that all of the available

permits for vested lots had already been issued. The plaintiffs now appeal the Town's decision, seeking an injunction to bar the Town from denying the building permit, or alternatively, a writ of mandamus to compel the Town to grant the permit.

The plaintiffs assert that the Town's application of the Growth Control and Permit Limitations against them violates RSA 674:39, which provides in relevant part, that:

> [e]very plat or site plan approved by the planning board and properly recorded in the registry of deeds shall be exempt from all subsequent changes in subdivision regulations, site plan review regulations, and zoning ordinances adopted by any city, town, or county ... for a period of 4 years after the date of recording ... .

RSA 674:39. Only "those regulations and ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements" may be applied to subdivisions during the four-year exemption period. Id. The Town does not deny that the growth control limits are zoning ordinances and does not argue that the limits "expressly protect public health standards." See Beck v. Town of Raymond, 118 N.H. 793, 797 (1978) (Supreme Court rejected town's "public health" argument where "slow-growth" zoning ordinance conflicted with RSA 674:39 predecessor statute). The Town, instead, claims that RSA 674:22 and 674:23, which permit towns to exercise growth management, supersede the four-year exemption. The Town believes that the growth control statutes and the four-year exemption statute are in conflict with each other, and that the growth control statutes must take precedence or

become void, since a significant portion of the Town's growth comes from the development of subdivisions.

The Court first notes that RSA 674:23 pertains to interim growth regulations only, and as such, has no application to the present dispute, since the plaintiffs applied for and were denied a building permit under the permanent ordinance provision, after the expiration of the Town's interim growth management ordinance. The relevant language of RSA 674:22 provides that towns "may further exercise the powers granted under this subdivision to regulate and control the timing of development" and only after the town prepares and adopts a master plan, a capital improvement program, and a growth management process to "assess and balance" the development needs of the community and the region. Given these restrictions on the manner in which a town might control growth, clearly RSA 674:22 does not accord unlimited power to the town to manage growth.

"When interpreting two statutes which deal with a similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute." Brosseau v. Green Acres Mobile Homes, 135 N.H. 643; 646 (1992) (quotation omitted); see Sprague Energy Corp. v. Town of Newington, 142 N.H. 804, 806 (1998); 73 Am.Jur.2d, Statutes, § 254 ("Where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt that construction of a statutory provision which harmonizes and reconciles it with other statutory provisions"). The Court notes that RSA 674:39 has been amended by the legislature three (3) times (1989, 1991, and 1995) since RSA 674:22 took effect. In the 1991 amendment, (N.H. Laws 1991,

331:4), the legislature announced that the purpose of the amendment was "to confirm and re-emphasize the intent of the general court at the time of the enactment" of RSA 674:39 in favor of protecting new subdivisions from zoning ordinances. See Blue Mountain Forest Ass'n v. Town of Croydon, 119 N.H. 202, 205 (1979) (amendment clarifying former statute is strong evidence of legislature's original intent).

Within the language of RSA 674:39, the legislature specifically excepted from the four-year exemption any regulations "which expressly protect public health standards, such as water quality and sewage treatment requirements," proving that they were capable of creating exceptions to the four-year limit where they deemed appropriate. Because the legislature has amended RSA 674:39 since the adoption of RSA 674:22, and RSA 674:39 contains a list of specific exceptions to its applicability, the familiar axiom of statutory construction applies, *expressio unius est exclusio alterius:* "normally the expression of one thing in a statute implies the exclusion of another." St. Joseph Hosp. of Nashua v. Rizzo, 141 N.H. 9, 11-12 (1996); see also Silva v. Botsch, 120 N.H. 600, 602 (1980) ("Unless there is evidence to the contrary, statutory itemization indicates that the legislature intended the list to be exclusive").

The Court finds and rules that the statutes do not contradict each other, but rather that RSA 674:22 applies to growth management generally, but not to those subdivisions protected by the four-year exemption period of RSA 674:39. The Town's concern over the unfettered development of subdivisions might be addressed by controlling the number and type of subdivisions approved under the power granted by RSA 674:35, rather than by

approving a subdivision and then placing zoning restrictions on it later, during the four-year exemption period, in clear violation of RSA 674:39.

The Town further claims that it satisfied RSA 674:39 by issuing an unlimited number of permits between April 14, 1999 and June 13, 1999 in order "to reasonably accommodate any common law or statutory vested rights that any developer of a pre-existing subdivision might have." Def.'s Answer at 4. At oral argument, the Town made an offer of proof concerning school overcrowding in the Town and the measures enacted to accommodate vested property owners. Under the clear language of RSA 674:39, however, it is not unreasonable zoning restrictions that are prohibited, but rather all zoning restrictions, other than those expressly excepted, for a period of four years. For purposes of this action, the plaintiffs do not challenge, and the Court need not address, the reasonableness of the Town's actions, because the application of RSA 674:39 is clear and dispositive.

To be entitled to an injunction, the plaintiffs bear the burden of proving that there "is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law." Unifirst Corp. v. City of Nashua, 130 N.H. 11, 14 (1987) quoting Murphy v. McQuade Realty, Inc., 122 N.H. 314, 316 (1982). In addition, the court will balance the hardships to both parties. N.H. Donuts, Inc. v. Skipitaris, 129 N.H. 774, 781 (1987). "The granting of an injunction ... is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." Varney v. Fletcher, 106 N.H. 464, 467-68 (1965).

Accordingly, the plaintiffs' request for Permanent Injunctive Relief is GRANTED. The Town is hereby enjoined from refusing to issue a building permit to plaintiff Iacozzi on the basis of the Growth Control Ordinance. The plaintiffs' request for attorney's fees is DENIED. The plaintiffs have submitted requests for findings of fact and rulings of law; however, the Court's findings and rulings are embodied in its narrative discussion above. The plaintiffs' requests are GRANTED to the extent that they are consistent with this order; DENIED to the extent that they are inconsistent with this order; and NEITHER GRANTED NOR DENIED to the extent that they are irrelevant to the determination of this issue. See Geiss v. Bourassa, 140 N.H. 629, 632-33 (1996).

So **Ordered.**

DATE: January 31, 2000

/s/ Richard Galway
Richard E. Galway
PRESIDING JUSTICE

APPENDIX O

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

MDR Corporation

v.

Town of Fremont
99-E-444

ORDER

Before the Court is the Plaintiff's Amended Petition for Declaratory Judgment and Injunctive Relief challenging the validity of the Town of Fremont's ("the Town") Growth Control Ordinance and its decision to deny certain building permits to the plaintiff based on that ordinance. MDR brought this action on August 27, 1999 and filed an amendment to the Petition on October 21, 1999. This Court denied MDR's request for temporary injunctive relief on September 23, 1999. The Court conducted a final hearing on the merits on December 6, 1999.

For purposes of this Order, the Court finds the following facts. At the Town Meeting on March 11, 1987, after the forty-three (43) Articles set forth in the warrant were voted on, an oral motion was made, seconded, and passed:

> To see if the Town will vote to authorize the Selectmen to appoint a committee to prepare and submit recommendations to the Planning

> Board for a Capital Improvement Program; said committee to be composed of eight members, including representatives from the Planning Board, School Board, Police Department, Fire Department, Selectmen, Conservation Commission, Parks and Recreation Commission and from the general public.

MDR's Amendment to Petition at ¶ 7, 8. At the first session of the March 1999 Town Meeting, the Town passed a Growth Management and Innovative Land Use Control as part of the Town Zoning Ordinance, replacing an Interim Growth Management Ordinance passed in 1998. Pursuant to the growth management ordinance passed at the March 1999 Town Meeting, on April 14, 1999, the Town Planning Board imposed "Growth Control and Permit Limitations." These limitations provide that, for the period between April 14, 1999 and April 13, 2000, three (3) permits would be issued to lot owners "who do not have vested rights" and twenty-six (26) permits would be issued to all other lot owners.

The plaintiff, MDR Corporation ("MDR") owns a parcel of land in Fremont, New Hampshire known as Glidden Hill Estates, subject to a fourteen lot subdivision plan approved by the Town Planning Board on May 5, 1999 and registered with the Rockingham County Registry of Deeds on August 14, 1999. After the Ordinance had taken effect, MDR applied for six (6) building permits to construct single family homes on the property. The Town granted five (5) permits and told MDR that no further permits would be available until April 2000 at the earliest, citing the Town's 1999 Growth Management Ordinance in support of its decision to deny additional permits.

MDR challenges the legality of the Town's Growth Management and Innovative Land Use Control Ordinance ("the Ordinance"), asserting that the Town has failed to create a valid capital improvement program ("CIP"), as required by RSA 674:22, which states, in relevant part:

> The local legislative body may further exercise the powers granted under this subdivision to regulate and control the timing of development. Any ordinance imposing such a control may be adopted only after preparation and adoption by the planning board of a master plan and a capital improvement program and shall be based upon a growth management process intended to assess and balance community development needs and consider regional development needs.

RSA 674:22 (emphasis added). The Town's "local legislative body" is the Town Meeting. See RSA 672:8, V. When properly authorized by a majority vote of the Town Meeting, a planning board may "prepare and amend a recommended program of municipal capital improvement projects...." RSA 674:5. "The subject matter of all business to be acted upon at the town meeting shall be distinctly stated in the warrant, and nothing done at any meeting, ... shall be valid unless the subject thereof is so stated." RSA 39:2.

Since the motion to appoint a committee to make recommendations concerning a CIP was not among the forty-three (43) published Articles on the 1987 warrant (see *supra* at 1, 2), the motion was, therefore, invalid. Even if

the motion had complied with the notice requirements of RSA 39:2, it did not authorize the creation of a CIP, but rather, purported to authorize the Selectmen to create a committee to make recommendations concerning the substance of a future CIP. Since the motion was not valid, and the Town has not set forth any other evidence that the CIP is otherwise valid, the Town has never adopted a valid or enforceable CIP.

The Growth Control Ordinance, therefore, is invalid *ab initio* for failing to comply with the statutory requirements of RSA 674:22. Accordingly, MDR's request for Injunctive Relief is, GRANTED. The Town is hereby enjoined from refusing to issue building permits to MDR on the basis of the Growth Control Ordinance. MDR's request for attorney's fees is DENIED.

MDR has submitted requests for findings of fact and rulings of law; however, the Court's findings and rulings are embodied in its narrative discussion above. MDR's requests are **GRANTED** to the extent that they are consistent with this order; otherwise, they are **DENIED.** See Geiss v. Bourassa, 140 N.H. 629, 632-33 (1996).

So **Ordered**.

Date: December 27, 1999

/s/ Walter Murphy
Walter L. Murphy
PRESIDING JUSTICE

APPENDIX P

New Hampshire Constitution

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First Part, Article 12

Protection and Taxation Reciprocal.--- Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent.

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